Article

Restoring the Natural Law: Copyright as Labor and Possession

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This Article advocates the restoration of the natural law[1] to our copyright jurisprudence. Although eighteenth and nineteenth century thinkers were keenly aware of copyright's natural law dimensions,[2] modern copyright jurisprudence tends to view copyright strictly as a means of achieving economic efficiency.[3] This approach finds support in United States Supreme Court pronouncements which state that copyright exists solely to provide economic incentives for the production of useful works.[4]

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1. Defining the natural law is a difficult task, and any definition will be incomplete. However, in this Article, I am referring to the jurisprudential tradition which links the law to universal principles of truth or morality. This tradition contains at least two identifiable limits on the reach of human law. The first, which is quasi-scientific in outlook, recognizes "that there are inherent characteristics in human beings and other animate things as well as in the physical world and in social structures. These inherent characteristics determine their behavior and establish substantial limits on changes that can be made with regard to them." W.M. REISMAN & A.M. SCHREIBER, JURISPRUDENCE, UNDERSTANDING AND SHAPING LAW 170 (1987). *See also* G.W. PATON, JURISPRUDENCE 80 (2d ed. 1951) (". . . [*J*]*us Naturale* [natural law] was the fundamental basis of every legal system, for, however much conventional law may change, rules based on nature are beyond the power of man."). The second limit, which is humanist in outlook, holds that all human laws must contain some intrinsic moral value. Thus, laws which maintain no connection with universal principles of morality are invalid. *See* L. WEINREB, NATURAL LAW AND JUSTICE 1-7 (1987) (describing natural law as "a theory about the nature of being, the human condition in particular"); A.P. D'ENTREVES, NATURAL LAW, AN INTRODUCTION TO LEGAL PHILOSOPHY 116 (1952) ("The notion of natural law partakes at the same time of a legal and of a moral character.").

2. *See* G. CURTIS, TREATISE ON THE LAW OF COPYRIGHT 1-19 (1847); 2 J. KENT, COMMENTARIES ON AMERICAN LAW 298, 306-08, 314-15 (1827 & photo. reprint 1984); 2 W. BLACKSTONE, COMMENTARIES*405-06. Briefly stated, copyright is sometimes seen as the legal vindication of a person's inherent right to property in the fruits of her labor. Thus, the author of a book is entitled to copyright therein as a matter of fundamental justice. This theory is the descendant of English and Roman natural law doctrines which based property on labor and possession. *See infra* notes 28-44 and accompanying text.

3. *See, e.g.*, Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970); Fisher, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659 (1988); Hurt & Schuchman, *The Economic Rationale of Copyright*, 78 AM. ECON. ASSOC. PAPERS & PROC. 421 (1966); Landes & Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989); Menell, *An Analysis of the Scope of Copyright Protection for Application Programs*, 41 STAN. L. REV. 1045 (1989). *See also* Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory*, 41 STAN. L. REV. 1343, 1435 (1989) ("Most of the literature discussing the desirability of intellectual property systems has focused on economics . . .").

4. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429, *reh'g denied*, 465 U.S. 1112 (1984):

> The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public

Under this view, copyright is necessary because in its absence those interested in using the author's work would simply copy the work instead of buying it from the author.[5] Authors would then find their economic returns too small to justify the costs of authorship. In such a situation authors might not produce, and social welfare would presumably suffer.[6]

To remedy this problem, economic theory supports granting authors copyright in their works. However, those rights are necessarily limited in scope, because copyright imposes costs on society in exchange for the benefits of induced creative activity. First, the owner of copyright rights will charge a monopoly price for her work. The number of people who gain access to the work will therefore decrease.[7] Second, copyright raises the production cost of future works, because it prohibits borrowing from existing works and makes it more difficult for future authors to create.[8] Thus, the optimal degree of copyright protection is that amount which maximizes the difference between the benefits of induced creative activity and the costs of increased authors' rights.[9] The appeal of this approach is plainly evident, for it apparently provides a method for prescribing the assignment of property rights through copyright. Authors receive only those rights which promote economic efficiency.[10] This can be seen in the economic interpretation of major copyright concepts such as "originality" and the "idea/expression dichotomy."[11]

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purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

In Mazer v. Stein, 347 U.S. 201, 219, *reh'g denied*, 347 U.S. 949 (1954), the Court wrote as follows:

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts."

See also Diamond v. Am-Law Publishing Corp., 745 F.2d 142 (2d Cir. 1984); Quinto v. Legal Times of Washington, Inc., 511 F. Supp. 579 (D.D.C. 1981).

5. Throughout this Article the word "author" is used in its broad copyright sense.

6. Landes & Posner, *supra* note 3, at 328. In economic terms, an inefficiency, or "market failure," has occurred. *See* Menell, *supra* note 3, at 1058-60.

7. Fisher, *supra* note 3, at 1700-02.

8. Landes & Posner, *supra* note 3, at 332.

9. Fisher, *supra* note 3, at 1717; Landes & Posner, *supra* note 3, at 326. This economic statement captures the conventional adage that copyright balances incentives for production against the need for free access to works.

10. In other words, copyright should be used to correct market failures, but only to the extent that the economic benefits of doing so exceed the economic costs. *See* Menell, *supra* note 3, at 1058.

11. These concepts are embodied in our present copyright code at 17 U.S.C. § 102 (1988). Together they define the existence and scope of copyright in a given work. Originality provides the basic requirement for copyrightability by providing that only "original works of authorship" are eligible for protection. 17 U.S.C. § 102(a) (1988). Copyright therefore does not protect works which lack minimal creativity or are simply copies of other preexisting works. *See* Toro Co. v. R & R Prods. Co., 787 F.2d 1208 (8th Cir. 1986) (parts numbering system not original); L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486 (2d Cir.), *cert. denied*, 429 U.S. 857 (1976) (copy of preexisting work lacks originality); Magic Mktg. v. Mailing Servs. of Pittsburgh, 634 F. Supp. 769 (W.D. Pa. 1986) (advertising phrases on envelope lack originality). *See also infra* notes 94-118 and accompanying text.

However, the mere fact that a work is an "original" does not mean that copyright prohibits all borrowing from that work. Instead, the idea/expression dichotomy permits some borrowing from every copyrighted work by specifically excluding ideas from an author's property. 17 U.S.C. § 102(b) (1988). Thus, even though a book is protected by copyright, a future author is free to borrow the ideas embodied in the book. Only the book's expressions remain protected from copying. Baker v. Selden, 101 U.S. 99 (1879) (idea of double entry bookkeeping not protected by copyright); Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485 (9th Cir.), *cert.*

Since originality defines the works eligible for copyright protection, its economic interpretation becomes an exercise in determining whether extending copyright to a given class of works promotes social welfare.[12] Similarly, application of the idea/expression dichotomy becomes an economic cost-benefit calculation. If authors need more incentive to produce creative works, then fewer facets of works should be considered ideas, and more facets should be considered expressions.[13] If society needs greater access to works, the converse is true.[14] This vision suggests the use of economic analysis to strike a reasonable balance between the interests of authors and the interests of society.

Unfortunately,[15] this vision alone cannot adequately guide the development of copyright law. Instead of maintaining a balance between the interests of authors and society, modern courts and legislatures have used copyright to steadily expand authors' rights. For example, a nineteenth century copyright plaintiff could prove infringement only by showing that the defendant had borrowed the literal features of the plaintiff's work. Thus, a plaintiff trying to enforce copyright in a book would have to show at least some appropriation of the literal text and perhaps a good deal more. Mere borrowing of a plot or theme would not be sufficient.[16] By contrast, a present day plaintiff finds a growing number of influential decisions which suggest that practically any borrowing from a copyrighted work may constitute copyright infringement.[17] Modern courts have

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denied, 469 U.S. 1037 (1984) (ideas on how to play Scrabble not protected by copyright). *See infra* notes 121-30 and accompanying text.

12. An excellent example of this reasoning is Clayton v. Stone, 5 F. Cas. 999 (C.C.S.D.N.Y. 1829) (No. 2,872), in which the plaintiff sued the defendants for copying daily market quotations published by the plaintiff. In denying copyright to the plaintiff's publication on grounds of insufficient originality, the court wrote as follows:

> [G]reat praise may be due to the plaintiffs for their industry and enterprise in publishing this paper, yet the law does not contemplate their being rewarded [via copyright]; it must seek patronage and protection from its utility to the public and not as a work of science. The title of the act of [C]ongress is for the encouragement of learning, and was not intended for the encouragement of mere industry, unconnected with learning and the sciences.

Id. at 1003. As this Article will later discuss, modern courts are generally reluctant to engage in an assessment of a work's value. *See infra* notes 109-18 and accompanying text.

13. The logic of this proposition is as follows: If more copyright protection is granted to works, then authors will have greater economic rights, and therefore greater incentives to produce creative works. Thus, increasing the proportion of expressions found in works increases the incentive to authors. Of course, if too much copyright protection is granted, authors may find it difficult to create new works. *See* Landes & Posner *supra* note 3, at 332.

14. The case of Whelan Assocs. v. Jaslow Dental Laboratory, 797 F.2d 1222 (3rd Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987), clearly states this view:

> [P]recisely because the line between idea and expression is elusive, we must pay particular attention to the pragmatic considerations that underlie the distinction and copyright law generally. In this regard, we must remember that the purpose of the copyright law is to create the most efficient and productive balance between protection (incentive) and dissemination of information, to promote learning, culture and development.

Id. at 1235. *See also* Menell, *supra* note 3, at 1065 (1989).

15. I use the word "unfortunately" because the conceptual tidiness of the economic model is so seductive. If we truly could base copyright on economics alone, many of the hard philosophical issues in property law could be avoided in favor of a quest for efficiency. As a matter of theory, a sophisticated set of mathematical equations could express the optimal copyright regime. *See* Landes & Posner, *supra* note 3, at 333-43. Against this backdrop, the realization that economics cannot solve our problems seems unfortunate, for we are forced to confront again the difficult and uncertain issues inherent in shaping a scheme of property rights.

16. *See infra* note 119.

17. *See* Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel"*, 38 EMORY L.J. 393, 407-20 (1989).

used copyright to protect an artist's perspective,[18] the general appearance of works,[19] the basic structure of a computer program,[20] and the page numbers of legal case reporters.[21]

Under the economic copyright model, the propriety of copyright's expansion rests solely on an economic cost-benefit calculation. Courts should allow copyright to expand as long as the benefits of increased creative activity outweigh its costs. If we are serious about the exclusion of other property theories from copyright jurisprudence, no other considerations are relevant. Even though the concepts of fairness, equity and justice might suggest directions in which to proceed, we must ignore them in favor of economic analysis.

A critical look at modern copyright reveals the error in such a course of action. First, copyright protects works whose creation does not depend on the economic incentive of copyright.[22] In fact, courts frequently decide controversial copyright cases with no explicit consideration of the economic consequences. This implies that something besides economics influences copyright decisions.[23] Second, analysts disagree sharply over the economic implications of copyright.[24] This raises doubts about whether economics is in fact capable of yielding reliable policy recommendations.[25]

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18. Steinberg v. Columbia Pictures Indus., Inc., 663 F. Supp. 706, 712 (S.D.N.Y. 1987) ("one can hardly gainsay the right of an artist to protect his choice of perspective and layout in a drawing, especially in conjunction with the overall concept and individual details.").

19. Sid & Marty Krofft Television Prods. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977) (protecting the "total concept and feel" of television show); Roth Greeting Cards v. United Card Co., 429 F.2d 1106 (9th Cir. 1970) (protecting the "total concept and feel" of greeting cards); Broderbund Software, Inc. v. Unison World, Inc., 648 F. Supp. 1127 (N.D. Cal. 1986) (protecting the "total concept and feel" of visual displays created by computer program).

20. Whelan Assocs., v. Jaslow Dental Laboratory, 797 F.2d 1222 (3rd Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987) (extending protection to the sequence, structure and organization of a computer program). For an attack on the expansion of copyright implied by *Whelan*, see Davis, *Computer Software—The Final Frontier: Clones, Compatibility and Copyright*, THE COMPUTER LAW., June 1985, at 3 ("[*Whelan*] is dangerously wrong, and flies in the face of every copyright case involving the 'idea/expression dichotomy' since 1880.").

21. West Publishing Co. v. Mead Data Central, Inc., 799 F.2d 1219 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987). *Cf.* Rockford Map Publishers, Inc. v. Directory Serv. Co., 768 F.2d 145 (7th Cir. 1985), *cert. denied*, 479 U.S. 1061 (1986) (prohibiting defendant from copying information found in plaintiff's map).

22. *See infra* notes 133-36 and accompanying text.

23. Despite the professed allegiance to economic copyright analysis, recent scholarship suggests the academic adoption of noneconomic copyright thinking. *See* Gordon, *supra* note 3, at 1351 (arguing that "'wealth maximization' as an aggregative criterion that disregards the possibility of independently derived individual rights, cannot serve as an acceptable foundation for the initial assignment of entitlements."). *See also* Brown, *Eligibility for Copyright Protection: A Search for Principled Standards*, 70 MINN. L. REV. 579, 607 (1985) (advocating the combination of economic and authors' rights approaches); Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590 (1987) (analyzing the work made for hire doctrine by merging author-based and economic approaches); Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988) (basing intellectual property on philosophies of Locke and Hegel); Kauffman, *Exposing the Suspicious Foundation of Society's Primacy in Copyright Law: Five Accidents*, 10 COL. J.L. & ARTS 381 (1986) (contending that natural law should be the dominant theory in copyright).

24. *Compare* Breyer, *supra* note 3 (questioning the economic justification for copyright) *with* Abramson, *How Much Copying Under Copyright? Contradictions, Paradoxes, Inconsistencies*, 61 TEMPLE L. REV. 133, 142-45 (1988) (advocating the economic desirability of greater copyright protection for research); *and* Tyerman, *The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer*, 18 UCLA L. REV. 1100 (1971). *See also* Litman, *The Public Domain*, 34 EMORY L.J. ____ (fall 1990) (referring to the "unruly brawl" among economists).

25. *See* Brown, *supra* note 23, at 596 (1985) ("The hard part, even for an economist, is to decide just how much legitimation of exclusive rights in intellectual property is needed to induce the optimal flow of writings and

These problems motivate this Article's inquiry. If noneconomic principles affect copyright's shape, then ignoring those principles puts copyright theory out of touch with judicial practice. Moreover, if genuine doubts about the reliability of economics exists, then rejecting the insights of other analytical methods, particularly those which already affect copyright, would seem ill-advised. Indeed, noneconomic theories might prove helpful in surmounting the deficiencies of economic analysis. Consequently, this Article explores the problems associated with viewing copyright solely as a tool for achieving economic efficiency, as well as how natural law can help deal with these shortcomings.

First, the Article demonstrates that economics has not been solely responsible for copyright's development and basic structure. Part I briefly reviews copyright's history and doctrine to reveal the unmistakable presence of natural law alongside economic theory. The Article will show that copyright has somehow developed along lines suggested by neutral law despite the economic focus of modern copyright jurisprudence. Thus, the economic copyright model provides an unnecessarily cramped perspective by ignoring a rich jurisprudential tradition which is already imbedded in copyright. This alone suggests the restoration of natural law to our copyright jurisprudence, if only to accurately reflect the course of copyright's development.

Second, the Article considers the consequences of extinguishing copyright's natural law facets in favor of the blind pursuit of efficiency. Part II demonstrates that even if a doggedly economic perspective on copyright is deemed desirable,[26] there is little hope that such a course of action will yield recommendations on which we may confidently rely. Even if we make the simplifying assumption that wealth acts as a surrogate for welfare, sound recommendations will elude us. First, society cannot collect the information necessary to determine whether a given scheme of copyright will maximize wealth. Second, even if the information were available, economic theory itself suggests that the use of wealth maximization to assign property rights leads to indeterminate or multiple policy recommendations. The wealth maximizing society risks endlessly switching back and forth between inconsistent wealth maximizing positions or else weakly justifying whatever set of rights is proposed. These problems suggest that natural law could prove helpful in constructing a sensible copyright regime.

Third, the Article explores the implications of explicitly restoring natural law thinking to copyright jurisprudence. In particular, Part III describes how natural law can help maintain a balanced perspective on copyright by justifying both authors' rights and a strong public domain. In so doing, the Article addresses the common concern that natural law leads to the unprincipled expan-

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of inventions. Not much has been written on this critical issue and what there is gives little immediate guidance."). Certainly it is plausible that the divergent recommendations might be resolved with advances in the state of economic research. However, practical and theoretical obstacles make this a doubtful proposition. *See infra* notes 143-77 and accompanying text.

26. Although it is beyond the scope of this Article to redebate this point, it seems obvious that we should hesitate to ever define rights through economic efficiency alone. *See infra* notes 155-56 and accompanying text.

sion of authors' rights. The Article concludes with a brief observation about the use of natural law and economics in future copyright thinking.

I. A DESCRIPTIVE ACCOUNT OF NATURAL LAW IN COPYRIGHT

A. *A Natural Law Theory of Copyright*

The study of natural law's influence in copyright requires identifying the relevant concepts at their source, Roman natural law.[27] Although natural law later developed claims of moral supremacy,[28] the Romans had far humbler aspirations for their natural law. Romans did not consider natural law morally superior to other forms of law. Indeed, they recognized that law sometimes justifiably supported institutions directly contrary to natural law.[29] Instead, Romans viewed natural law as justified simply because the principles of natural law reflected the reality of nature. Such principles were therefore sensible ways to govern the affairs of persons.[30]

Although the Romans recognized numerous methods of acquiring ownership in things,[31] the primary form of acquisition was the natural law principle of occupancy, or *occupatio*. The concept was simple. "Natural reason admits the title of the first occupant to that which previously had no owner."[32] Thus, objects belonged to those who first took possession of them.[33]

Not surprisingly, Roman natural law also contained limits on the extent of ownership one could claim through occupancy. These limits were the logical corollaries of occupancy. If a person owned what she possessed, she could not own those objects which were by nature impossible to possess. Natural law could not recognize individual ownership of these things because an attempt to do so would be futile. For example, the doctrine of *res communes* held that "the following things are by natural law common to all—the air, running water, the sea, and consequently the sea-shore."[34] Similarly, under the doctrine of *ferae naturae*, wild animals were inherently free, and were considered property only so long as the owner maintained actual physical possession. If a wild animal

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27. The Romans divided law into three parts: *jus naturale*, *jus gentium*, and *jus civile*. *Jus naturale*, or natural law, was considered common to all men because it reflected the true nature of things. *Jus gentium*, or the law of nations, consisted of principles shared by all civilized societies. Barbarians apparently did not share these values. *Jus civile*, or civil law, reflected principles which were strictly Roman in nature. *See* J. INST. 1.2.1-2 (J.B. Moyle trans. 3rd ed. 1896); Dig. 1.1.1.2 (A. Watson trans. 1985); L. WEINREB, *supra* note 1, at 44-46; A.P. D'ENTREVES, *supra* note 1, at 24-30 (1952).

28. A.P. D'ENTREVES, *supra* note 1, at 59-61 (1952). *See infra* notes 37-39 and accompanying text.

29. *Id.* at 30.

30. *Id.* at 29-30, 49. Roman natural law was part of the Roman attempt to understand the simple reality of the world in which the Romans lived. Unlike eighteenth century English natural law, there was nothing aspirational about Roman natural law. Roman natural law was simply the set of legal rules which corresponded to the simple facts of life. As such, it was a quasi-scientific, inherently rational way of constructing the law. If water flowed downhill, then Roman natural law would reflect that reality.

31. INSTITUTES 2.1.1-2.1.18; DIGESTS 41.1.1.

32. INSTITUTES 2.1.12; DIGESTS 41.1.3.

33. INSTITUTES 2.1.18; DIGESTS 1.8.3.

34. INSTITUTES 2.1.1; DIGESTS 1.8.2, 1.8.4.

escaped, it regained its inherent liberty. Therefore, it no longer belonged to its original owner and could become the property of its next captor.[35]

Roman natural law had a powerful influence on the law of eighteenth century England.[36] The general concept of natural law entered England through the work of medieval and enlightenment scholars. However, the English changed natural law's fundamental character. As noted earlier, Roman natural law was the construction of rules which simply *reflected* the way things were. By contrast, English natural law became the construction of rules which *prescribed* the way things were. This development transformed the natural law of property from the simple reflection of nature's status quo to the legal vindication of a person's natural rights.[37]

This outlook on the natural law of property can be seen in the philosophy of its most famous proponent, John Locke. Locke began with the assumption that people had a natural right of property in their bodies. Since people owned their bodies, Locke reasoned that they also owned the labor of their bodies and, by extension, the fruits of that labor.[38] Thus, a person who mixed her labor with an unowned object became morally entitled to property in that object.[39]

The English transformation of natural law carried the potential for a massive change in the natural law of property. If, as Locke intimated, labor were all that was necessary to give a person a natural right of property in an unowned object, then perhaps an individual's labor would be sufficient to make the ocean her private property.[40] However, this result never reached doctrinal fruition. Instead, Roman doctrines of possession survived more or less intact as part of English natural law, thereby limiting the vindication of an individual's labor to objects which were thought of as inherently capable of possession. Thus, although Blackstone noted Locke's theoretical justification of property through labor, he explicitly grounded the vesting of personal property upon the natural law of occupancy.[41] Similarly, Blackstone adopted Roman natural law logic by limiting the reach of occupancy through the doctrines of *res communes* and *ferae naturae*.[42]

The effect of all this was that the English natural law of property developed as the combination of two legal traditions: the Roman doctrines of possession and the moral philosophy of Locke. In other words, the English did see property law as the vindication of a person's moral right to property in the

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35. INSTITUTES 2.1.12-15; DIGESTS 41.1.5.

36. For our purposes, the eighteenth century English view of natural law is particularly important, for it provided the philosophical and moral underpinnings of property that were prevalent during copyright's formative years.

37. A. P. D'ENTREVES, *supra* note 1, at 49, 59-61. In other words, the Romans constructed natural law by determining the way the world was. By contrast, the English constructed natural law by determining the way they wanted the world to be. *Id.*

38. J. LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT § 27, in TWO TREATISES OF GOVERNMENT (1698) (P. Laslett ed. 1970).

39. *Id. See also* L. BECKER, PROPERTY RIGHTS 32-57 (1977).

40. *Cf.* R. NOZICK, ANARCHY, STATE, AND UTOPIA 175 (1974).

41. 2 W. BLACKSTONE, *supra* note 2, at *8, 400.

42. 2 W. BLACKSTONE, *supra* note 2, at *14, 395. These English conceptions of Roman law eventually traveled to America. *See* 2 J. KENT, *supra* note 2, at 289-93.

fruits of her labor. However, the English vindicated that right only if the fruits of that labor were considered capable of permanent possession. If those fruits of labor were similar to the sea, air, and light and therefore incapable of permanent possession, the laborer received no property and could claim only a temporary right of use.[43]

This view of property readily suggests the general contours of a copyright regime based upon the natural law. The justification of property as the consequence of a person's labor implies that an author's labor of creation supports copyright. As a general matter, a person rightfully claims ownership in her works to the extent that her labor resulted in their existence. The property exists regardless of any need for the economic stimulation of creative activity. However, it must be remembered that not all labor results in property. To the extent that the author creates things which are not capable of possession under the law, natural law doctrines prohibit the creation of a property interest.[44]

The ease with which one constructs a natural law theory of copyright suggests that such a perspective might offer useful insights, especially in areas where economic recommendations are uncertain. This realization alone suggests expanding our broadening copyright jurisprudence to include more than economics. However, the case supporting such a course of action runs deeper than this, for copyright's link to the natural law is historical as well as theoretical. As the next section demonstrates, both natural law and economic policy motivated copyright's development. Thus, expanding our perspective would put copyright theory in touch with copyright's actual roots.

B. *Two Roots of Copyright Theory*

Oddly enough, the story of copyright begins with a strange partnership of censorship and commercial interest. The development of the printing press enabled the rapid spread of written political and religious challenges to the authority of the British Monarch. The printing press also created a new industry, the printing and selling of books.

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43. Blackstone wrote as follows:

> [T]here are some few things, which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being such wherein nothing but an usufructuary property is capable of being had: and therefore they still belong to the first occupant, during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air and water . . .

2 W. BLACKSTONE, *supra* note 2, at *14. Thus, a person might labor to breathe air into her lungs. That labor would result in a valid claim to temporary use of the air. Once exhaled, though, the air again became the common property of all.

44. Although this section has developed possession as an actual physical limitation on the extent of a person's property, its application in copyright crosses into the metaphysical. The key notion is that inherent limits on the reach of human property exist. These limits ought to be respected because failure to do so results in chaos. *See supra* notes 1, 30, 34-35 and accompanying text. The Romans limited property in certain tangible things because those things were inherently difficult for humans to hold. Of course, in copyright we are not concerned with the actual physical possession of works. Physical possession of a book can be held separately from copyright in a book. *See* 17 U.S.C. § 109 (1988). However, certain facets of every work are denied property status because their inherent nature makes them difficult to "hold" as property through copyright. As we shall see, one may exclude ideas from copyright's reach because their vague nature renders them elusive targets for copyright law. *See infra* notes 215-25 and accompanying text.

Naturally, the Crown became interested in using censorship to suppress challenges to its authority. In 1557, Queen Mary enlisted the economic interests of printers and booksellers in the pursuit of her political goals. By Letters Patent, the Queen granted exclusive rights of printing to the members of the Stationers' Company. Company officials gained the power to seize and destroy unauthorized presses and books.[45] In return for the profits gained from their monopolistic control over the licensing and printing of books and pamphlets, the Stationers' Company acted as the enforcers of the Crown's censorship. This regime continued under various Star Chamber decrees until about 1640, when Parliament abolished the Star Chamber.[46]

After 1640, the Stationers' Company struggled to protect their property and power over the licensing and printing of books. Although England witnessed the Glorious Revolution and the reinstatement of the Crown during this period, the Stationers managed to maintain their position as the government's official printing press by petitioning for the so-called licensing acts.[47] In 1694, the House of Commons refused to renew the Licensing Act of 1662, and censorship lapsed.[48]

Although emancipation of the English press was a marvelous development, the Stationers' Company regarded it as tragic, for the end of censorship also marked the end of their virtually unfettered monopoly in the book trade. The most powerful group of Stationers, the booksellers,[49] supported renewal of the Licensing Act because "if their Property should not be provided for, . . . [the booksellers' livelihood] will be utterly ruined."[50] The House of Commons rejected the booksellers' plea, in part because the booksellers "are impowered to hinder the printing [of] all innocent and useful Books; and have an Opportunity to enter a title to themselves, and their Friends, for what belongs to, and is the Labour and Right of, others."[51] Attempts by the booksellers to gain new protective legislation failed in 1703 and in 1706.[52]

Having failed in three attempts to regain their monopoly through censorship, the booksellers changed tactics and appealed to the public interest. They argued that failure to continue exclusive rights of printing had resulted in disin-

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45. *See* B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 3-9 (1967); L. PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 27 (1968).

46. L. PATTERSON, *supra* note 45, at 114-25. The exact year is disputed. Messrs. Skone James, Mummery, and Rayner James state the year as 1640. Dean Patterson documents the year to be 1641. *Compare* E.P. SKONE JAMES, J. MUMMERY, J.E. RAYNER JAMES, COPINGER & SKONE JAMES, COPYRIGHT 8 (12th ed. 1980) *with* L. PATTERSON, *supra* note 45, at 125.

47. L. PATTERSON, *supra* note 45, at 126-34.

48. *Id.* at 139; 11 H.C. JOUR. 228.

49. *See* Patterson, *Private Copyright and Public Communication: Free Speech Endangered*, 28 VAND. L. REV. 1161, 1172 (1975).

50. Patterson, *supra* note 49, at 1172; 11 H.C. JOUR. 288.

51. L. PATTERSON, *supra* note 45, at 139; 11 H.C. JOUR. 306. The quoted passage is one of a long list of reasons for denying the booksellers' request. Interestingly, other reasons included the poor quality and high cost of the booksellers' editions.

52. L. PATTERSON, *supra* note 45, at 141-42; 14 H.C. JOUR. 306; 15 H.C. JOUR. 313. The House of Commons postponed consideration of the booksellers' desired legislation no less than fourteen consecutive times between January 13 and March 14, 1703. 14 H.C. JOUR. 278, 306, 312, 319, 327, 338-39, 347, 357, 366, 369, 372, 375, 376, 377. The booksellers' efforts met a similar, but quicker, fate in 1706. 15 H.C. JOUR. 321, 322, 346.

centives to writers. Without some sort of protection to encourage authors, the public interest would be harmed by the decreased flow of works.[53]

This tactic succeeded. The resulting statute, the Statute of Anne,[54] secured for authors the exclusive right to print their works. Among other things, the Statute granted authors copyright terms of up to twenty-eight years for newly published works.[55] The Statute protected the interests of the booksellers by extending the exclusive rights to the assigns of authors as well.[56] The booksellers knew that their position in the market was such that authors would, as a practical matter, be forced to sell their manuscripts to the Stationers' Company if they wanted to get their work published at all.[57]

For purposes of this Article, the Statute of Anne is of particular interest because it establishes copyright's development as economically inspired statutory law. Parliament enacted the Statute as a response to the booksellers' undesirable monopoly in the book selling business. Thus, the Statute purposefully limited the duration of the monopoly which could be claimed while providing some commercial stability for authors and publishers.[58] Furthermore, Parliament explicitly adopted the public interest as a touchstone for the Statute, entitling it "An Act for the Encouragement of Learning."[59] Final evidence of the Statute's economic focus follows from the fact that the Statute contained provisions for controlling the price paid for books.[60]

The economic policy espoused by the Statute of Anne temporarily mollified the self interest of the booksellers. However, the expiration of the statutory terms of protection again caused the booksellers' monopoly over certain works to lapse, giving competing publishers free access to previously copyrighted materials. The booksellers again turned to Parliament, but this time they failed to obtain relief.[61]

Unable to shake the legislature's views, the booksellers then tried the English courts. However, instead of appealing to the public's interest in providing incentives for the creation of works, the booksellers claimed that authors (and they themselves as the authors' assignees) owned perpetual common law copyrights in books.[62]

Drawing inspiration from noted scholars such as John Locke, the booksellers took advantage of the prevailing view that property arose from the labor of

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53. L. PATTERSON, *supra* note 45, at 142.

54. 8 Anne, ch. 19 (1710), *reprinted in* H. RANSOM, THE FIRST COPYRIGHT STATUTE 109-17 (1956).

55. The twenty-eight years consisted of an initial term of fourteen years, with a second term available if the author was still living at the end of the first term. *Id.* at 117. Existing works were given an additional twenty-one year term. *Id.* at 110. This constituted a direct windfall to already existing publishers.

56. *Id.*

57. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1139 n.54 (1983).

58. L. PATTERSON, *supra* note 45, at 146-47. The statute explicitly recognized the harm caused by pirates while rebuffing the Stationers' attempts for longer terms of copyright.

59. H. RANSOM, *supra* note 54, at 109.

60. *Id.* at 112-15.

61. The rebuke was stinging. A letter to an M.P. attacked the Stationers' request as "in Effect . . . establishing a perpetual Monopoly, a Thing deservedly odious in the Eye of the Law. . . ." L. PATTERSON, *supra* note 45, at 155.

62. *Id.* at 158.

the individual. They contended that books were peculiarly the product of human labor.[63] Since these books were therefore the author's property, any unauthorized use constituted an invasion of the author's property rights.[64] Under this line of reasoning, even if the Statute of Anne no longer protected a work from unauthorized reprinting, the common law did.

This argument reached its greatest prominence in the landmark case of *Millar v. Taylor*.[65] Millar was the publisher of James Thomson's poem "The Seasons."[66] As publisher, Millar had purchased Thomson's ownership in the poem and had enjoyed the protection of the Statute of Anne for a full term.[67] Once that term expired, the defendant Taylor began publishing the poem himself.[68] A lawsuit soon followed.

Millar focused his argument around the natural rights which flowed from the author's labor.[69] Millar contended that the resulting common law vindication of these rights could not be abridged by the Statute of Anne.[70] Taylor argued to the contrary. He asserted that common law copyright was a fiction. Since copyright was an incorporeal right, it was not capable of possession and therefore could not be recognized under principles of natural law.[71] Furthermore, he claimed that Millar's selling copies of the book constituted a dedication to the public. Therefore, any exclusive rights owned by Millar existed only to the extent provided by the Statute of Anne.[72]

The court decided three to one in favor of Millar. The majority focused on the justice inherent in vindicating the author's labor of creation:

> [B]ecause it is just, that an author should reap the pecuniary profits of his own ingenuity and labour. It is just, that another should not use his name, without his consent. It is fit, that he should judge when to publish, or whether he ever will publish. It is fit, he should not only choose the time, but the manner of publication; how many; what volume; what print. It is fit, he should choose to whose care he will trust the accuracy and correctness of the impression; to whose honesty he will confide, not to foist in additions: with the other reasonings of the same effect.[73]

In the view of two members of the majority,[74] the justice inherent in this reasoning made it imperative for the court to recognize the plaintiff's ownership of copyright under the law of occupancy. Even though the justices recognized the incorporeal nature of copyright, they believed that the problems of posses-

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63. *See infra* notes 69-72 and accompanying text.

64. *Id.*

65. 98 Eng. Rep. 201 (1769).

66. *Id.* at 205.

67. *Id.* at 203-04.

68. *Id.* at 204-05. Thomson first published "The Seasons" in 1727. Therefore, Taylor's republication on May 20, 1763, took place after the expiration of any protection afforded by the Statute of Anne.

69. *Id.* at 221, 229.

70. *Id.* at 202.

71. *Id.* at 219.

72. *Id.* at 202.

73. *Id.* at 252 (opinion of Mansfield, J.). *See also id.* at 220 (opinion of Aston, J.); *id.*, at 218 (opinion of Willes, J.) ("It is certainly not agreeable to natural justice, that a stranger should reap the beneficial pecuniary produce of another man's work.").

74. Each justice delivered his own opinion.

sion could be overcome.[75] In the view of the third, the plaintiff's claim had to be vindicated even though the law of occupancy did not do so.[76]

For our purposes, the decision of *Millar v. Taylor* is important because it established a natural law theory of copyright alongside the economic approach taken by the Statute of Anne. Copyright now existed not only by reason of economic necessity, but also by reason of the natural justice inherent in vindicating the author's labor through the natural law of possession. However, this state of affairs was short-lived. A scant five years later, the House of Lords overruled *Millar* in the case of *Donaldson v. Beckett.*[77]

Donaldson's reversal of *Millar* can be read as the elimination of natural law from copyright theory. After all, *Millar* expressly recognized the natural right of authors to property in their works. *Donaldson's* reversal therefore corrected the *Millar* court's error and left copyright standing solely as a matter of economically inspired statutory law. Indeed, *Donaldson* has been construed as conclusive proof that natural law has no place in copyright jurisprudence.[78]

Although such a broad reading of *Donaldson* is plausible, later events show that *Donaldson* did not conclusively eliminate natural law from Anglo-American copyright thinking. Even if the House of Lords specifically intended to destroy natural law as a basis for copyright, the *Donaldson* decision did not convince England's rebellious offspring, the Americans. Instead of reading *Donaldson* as the end of natural law in copyright, early American thinkers justified copyright under both natural law and economic principles.

The strongest evidence of this combination can be seen in the preambles of state copyright statutes which were enacted between 1783 and 1786. Many of these preambles explicitly referred to both economic and natural law theories of copyright. For example, the New Hampshire's statute stated as follows:

> As the improvement of knowledge, the progress of civilization, and the advancement of human happiness, greatly depend on the efforts of learned and ingenious persons in the various arts and sciences; as the principal encouragement such persons can have to make great and beneficial exertions of this nature, must consist in the legal security of the fruits of their study and industry to themselves; and as such security is one of the

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75. *Id.* at 221-22 (opinion of Aston, J.):

> [Copyright] is a personal, incorporeal property, saleable and profitable; it has indicia certa: for, though the sentiments and doctrine may be called ideal, yet when the same are communicated to the sight and understanding of every man, by the medium of printing, the work becomes a distinguishable subject of property, and not totally destitute of corporeal qualities.

Lord Mansfield concurred fully in Justice Aston's views. *Id.* at 251.

76. *Id.* at 218 (Opinion of Willes, J.):

> Metaphysical reasoning is too subtile; and arguments from [sic] the supposed modes of acquiring the property of acorns, or a vacant piece of ground in an imaginary state of nature, are too remote. Besides, the comparison does not hold between things which have a physical existence, and incorporeal rights.

77. 1 Eng. Rep. 837 (1774). Interestingly, *Donaldson* also involved James Thomson's "The Seasons." After the Millar v. Taylor decision, the common law copyright to "The Seasons" was acquired by a syndicate of printers. *Donaldson* arose when Beckett, a member of the syndicate, obtained an injunction against Alexander and John Donaldson, the proprietors of an unauthorized edition. Donaldson appealed to the House of Lords, who overturned *Millar*. Abrams, *supra* note 57, at 1156.

78. *See* Abrams, *supra* note 57.

natural rights of all men, there being no property more peculiarly a man's own than that which is produced by the labor of his mind . . .[79]

Further evidence is provided by Madison's apparent approval of *Millar* in his writings about the Constitution's copyright clause:[80]

> The utility of [the copyright power] will scarcely be questioned. *The copyright of authors has been solemnly adjudged in Great Britain, to be a right at common law.* The right to useful inventions, seems with equal reason to belong to the inventors. The public good fully coincides in both cases, with the claims of individuals.[81]

Thus, early American copyright theorists did not share the modern view that copyright is motivated solely by economic considerations. Instead, early Americans saw copyright as a matter of both economic policy and natural law. This means that modern copyright theory has lost touch with one of copyright's roots in early American legal thought. Indeed, American use of natural law after *Donaldson's* reversal of *Millar* illustrates natural law's powerful appeal in copyright. It also suggests that the adoption of a natural law perspective on copyright is necessary to accurately reflect and analyze the logic which has historically influenced copyright. The strength of this proposition increases with further consideration of copyright's development.

C. *The Influence of Natural Law in Modern American Copyright*

The study of natural law's influence in modern copyright starts with the seminal case of *Wheaton v. Peters*.[82] Like *Millar*, *Wheaton* involved a common

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79. Act of Encouragement of Literature, 1783 N.H. LAWS 305. The copyright statutes of Massachusetts and Rhode Island contained essentially identical preambles. An Act for the Purpose of Securing to Authors the exclusive Right and Benefit of publishing their Literary Productions for Twenty-one Years, ch. 26, 1783 MASS. LAWS 236; An Act for the Purpose of Securing to Authors the exclusive Right and Benefit of publishing their literary Productions, for Twenty-one Years, 1783 R.I. PUB. LAWS 6. Furthermore, the Connecticut statute provided:

> Whereas it is perfectly agreeable to the Principles of natural Equity and Justice, that every Author should be secured in receiving the profits that may arise from the Sale of his Works, and such Security may encourage Men of Learning and Genius to publish their Writings; which may do Honor to their Country, and Service to Mankind.

An Act for the Encouragement of Literature and Genius, 1783 CONN. PUB. ACTS. 617. The New York statute is substantially identical. An Act to Promote Literature, ch. 54, 1783 N.Y. LAWS 298. The New Jersey statute contained the following preamble:

> Whereas Learning tends to the Embellishment of Human Nature, the Honour of the Nation, and the general Good of Mankind; and as it is perfectly agreeable to the Principles of Equity, that Men of Learning who devote their Time and Talents to the preparing of Treatises for Publication should have the Profits that may arise from the Sale of their Works secured to them. . . .

An Act for the Promotion and Encouragement of Literature, ch. 21, 1783 N.J. LAWS 47. Finally, the North Carolina statute provided:

> Whereas nothing is more strictly a man's own than the fruit of his study, and it is proper that men should be encouraged to pursue useful knowledge by the hope of reward; and as the security of literary property must greatly tend to encourage genius, to promote the useful discoveries and to the general extension of arts and commerce . . .

An Act for Securing Literary Property, ch. 26, 1785 N.C. LAWS 403. For a more complete analysis of evidence that early Americans viewed copyright as a matter of natural law, see Kauffman, *supra* note 23, at 403-08.

80. Although the copyright clause supports economic interpretations of copyright, it does not eliminate natural law from copyright thinking. *See infra* note 91 and accompanying text.

81. THE FEDERALIST No. 43, at 279 (J. Madison) (E.M. Earle ed. 1976) (emphasis added).

82. 33 U.S. (8 Pet.) 591 (1834).

law claim to a work which had no statutory copyright protection. In *Wheaton*, the United States Supreme Court confronted a dispute between its official reporter, Richard Peters, and his predecessor, Henry Wheaton. The dispute centered around Peters' publishing a series of "Condensed Reports" which contained a number of decisions previously reported by Wheaton. Wheaton claimed that Peters' condensed reports violated Wheaton's statutory and common law copyright.[83] Like Millar, Wheaton based his common law copyright claim on the appeal of an author's inherent right to property in the fruits of his labor.[84]

The Court held, seven to two, in favor of Peters. The Court began its opinion by analyzing Wheaton's common law claim. The Court first distinguished common law copyright from an author's natural right to property in his manuscript. The former involved a perpetual right to control future publication of a work, while the latter consisted of a mere right to control his work until its first publication.[85] According to the Court, the common law could only recognize Wheaton's right of first publication because the broader claim might lead to an overly expansive author's monopoly.[86]

The Court also noted that even if it was plausible that American common law granted Wheaton's broader claim, English common law did not.[87] Furthermore, even if the English did recognize common law copyright, the relevant American jurisdictions did not.[88] Therefore, common law copyright did not exist in the United States, and Wheaton could claim relief only under the federal copyright statute.[89] The Court then denied Wheaton's claim under the federal statute on the ground that Wheaton had failed to comply with the statutory requirement of deposit for copyright protection.[90]

Like *Donaldson*, *Wheaton* can be read as requiring the elimination of copyright's natural law dimensions in favor of increasing emphasis on copyright's economic theory. First, *Wheaton* explicitly disavowed the existence of common law copyright, which was based in the natural law. Second, *Wheaton's* rejection of common law copyright meant that the federal copyright statute became the only source of copyright protection for a published work. Since the federal statute arose under constitutional authority to promote the useful arts, it seemed natural for courts to adopt this purpose as copyright's guiding principle.[91]

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83. *Id.* at 594-96.

84. *Id.* at 652.

85. *Id.* at 657.

86. *Id.*

87. *Id.*

88. *Id.* at 658-60. The Court's reasoning on this point is somewhat convoluted. With respect to federal law, the Court held that there was no such thing as federal common law. Thus, the existence of common law copyright was a matter of Pennsylvania state law. In answering this question, the Court noted that Pennsylvania had been colonized long before *Millar* recognized common law copyright in England. This in turn meant that Pennsylvania could not possibly have adopted common law copyright. For critiques of this reasoning, see Abrams, *supra* note 57, at 1183; 1 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 4.02[C] (1989).

89. Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 663 (1834).

90. *Id.* at 667-68.

91. U.S. CONST. art. I, § 8, cl. 8. The clause states "Congress shall be empowered . . . To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Rights to their respective Writings and Discoveries . . . ."

A superficial look at modern cases would seem to indicate that copyright has evolved under this reading of *Wheaton*. Many legislative and judicial statements display a clear economic orientation towards copyright.[92] However, the actual development of copyright law has never completely lived up to this rhetoric. Although the *Wheaton* Court rejected the plaintiff's common law copyright claim, the natural law concepts which inspired common law copyright and early copyright statutes remained part and parcel of copyright jurisprudence. Even though economics became the ostensibly sole basis of copyright, modern copyright somehow evolved along lines similar to those suggested by the natural law. This can be seen most clearly by outlining the basic copyright doctrines of originality and the idea/expression dichotomy[93] and then comparing them to the natural law of property through labor and possession. As we shall see, modern American copyright appears to vindicate an author's right to property in the fruits of her labor, but subject to the limits of what can be feasibly possessed.

1. *Originality and the Idea/Expression Dichotomy*

As noted earlier, the concepts of originality and the idea/expression dichotomy define the basic outlines of modern American copyright law. The copyright code grants protection to all "original works of authorship."[94] Conversely, the idea/expression dichotomy limits the reach of copyright by specifically excluding ideas from an author's property.[95]

Understanding the concept of originality begins with the seminal case of *Burrow-Giles Lithographic Co. v. Sarony*.[96] In *Sarony*, the plaintiff sued the defendant for reproducing a photograph of Oscar Wilde.[97] The defendant coun-

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Those who advocate a strictly economic analysis of copyright generally use the language "to promote the Progress of Science and the useful Arts" as support for their position. *See* Fisher, *supra* note 3, at 1696 n.184; Menell, *supra* note 3, at 1058. Although this language certainly supports economic visions of copyright, it does not eliminate natural law from copyright jurisprudence. In particular, the clause implies that Congress is not empowered to create a new right, but is instead empowered to secure for authors a preexisisting right. This view is supported by the fact that James Madison and Charles Pinckney each supported the clause by referring separately to encouraging knowledge and securing authors' rights. *See* L. PATTERSON, *supra* note 45, at 192-94, 195 ("The Constitution's copyright clause is so general that it is impossible to infer any one theory of copyright alone from the language."); Kauffman, *supra* note 23, at 407-08. *See also supra* notes 79-81 and accompanying text.

92. *See supra* note 4. *See also* H.R. REP. no. 2222, 60th Cong., 2d Sess. 7 (1909):

> The enactment of copyright legislation . . . is not based upon any natural right that the author has in his writings, . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.

93. Readers who are already familiar with these basic concepts may wish to skip to subsection two below.

94. 17 U.S.C. § 102(a) (1988). Interestingly, early copyright statutes specifically listed the types of works which could claim protection under the federal copyright statute. The first copyright act of 1790 limited protection to maps, books and charts (Act of May 31, 1790, ch. 15, 1 Stat. 124). The act was gradually amended throughout the nineteenth century to include musical compositions in 1831 (Act of Feb. 3, 1831, ch. 16, 4 Stat. 463), dramatic compositions in 1856 (Act of Aug. 18, 1856, ch. 169, 11 Stat. 138), and photographs and negatives in 1865 (Act of Mar. 3, 1865, ch. 126, 13 Stat. 540). By 1870 works of fine arts such as paintings and drawings supplemented the listing (Act of July 8, 1870, ch. 230, 16 Stat. 212). In 1909, however, Congress enlarged the scope of protection to broadly include "all the writings of an author," in section 4 of the revised enactment (Act of Mar. 4, 1909, ch. 320, § 4, 35 Stat. 1075, 1076 (codified at 17 U.S.C. § 102 (1988)).

95. 17 U.S.C. § 102(b) (1988).

96. 111 U.S. 53 (1884).

97. *Id.* at 53.

tered by claiming that photographs were nothing more than "reproduction[s] on paper of the exact features of some natural object or person. . . ."[98] Therefore, the defendant argued, photographs were not "writings" of "authors" and could never gain protection under any federal copyright statute.[99]

The defendant's argument failed. In ruling for the plaintiff, the Court rejected the notion that the term "writings" could be narrowly construed so as to exclude photographs from the purview of federal copyright. In doing so, the Court noted that the first copyright statute included maps and charts in its protectable subject matter.[100] Since that statute was enacted in 1790, soon after ratification of the Constitution, the Court reasoned that the Congress of 1790 must have contained many framers whose obviously broad interpretation of "writings" was entitled to great deference.[101] Thus, the Court felt compelled to include items other than books, essays and poems in the term "writings."[102]

Having justified its broad construction of "writings," the Court went on to define the constitutional scope of copyright. First, the Court defined "author" as "he to whom anything owes its origin; originator; maker; one who completes a work of science or literature."[103] The Court also defined "writings" as "the literary productions of those authors."[104] On the basis of these definitions, the Court held that the Congress had properly included "all forms of writing, printing, engraving, etching, &c., by which the ideas in the mind of the author are given visible expression."[105]

The Court then considered the defendant's contention that photographs could not owe their origin to an author because photographs amounted to no more than the physical reproduction of objects already existing in nature. The Court stated that the defendant might be correct with respect to "the ordinary production of a photograph."[106] However, the Court noted that in this case the photographer composed the photograph entirely from his own mental process of selection and conception.[107] This meant that the photograph was copyrightable as a product of the plaintiff's intellect.[108]

From the standpoint of copyright jurisprudence, *Sarony* is important because it decided the question of copyrightability by asking whether the work in

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98. *Id.* at 56.
99. *Id.*
100. *Id.* at 56-57.
101. *Id.* at 57.
102. *Id.*
103. *Id.* at 58.
104. *Id.*
105. *Id.*
106. *Id.* at 59.
107. According to the Court, the plaintiff's photograph arose:

> [E]ntirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture in suit.

Id. at 60.

108. The Court described the photograph as "an original work of art, the product of the plaintiff's intellectual invention, of which the plaintiff is the author . . . ." *Id.*

question was "original," *i.e.*, the result of the plaintiff's own mental conception. This approach was significant because it began the course whereby a work's copyrightability would rest not upon inclusion in a list such as "maps, charts and books" but instead upon production by an author, regardless of form.

Of course, the Court's use of the term "original" did not settle its meaning. At first, courts construed "original" to mean that the work had to display some sort of artistic merit.[109] However, this approach disappeared after the turn of the century, when the Supreme Court effectively removed any requirement that works demonstrate value as a prerequisite to copyright. In *Bleistein v. Donaldson Lithographing Co.*,[110] the plaintiff sued the defendant for copying three posters prepared by the plaintiff's employees to advertise his circus.[111] The defendant claimed that the plaintiff's posters could not be the proper subject of copyright because they were simply advertisements and lacked the necessary artistic value.[112] The Court rejected the defendant's argument. First, the Court stressed that copyrightability ultimately rests upon the intellectual labor of the author.[113] Second, and more importantly, the Court refused to assess the artistic value of the plaintiff's work. The Court wrote as follows:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. . . . At the other end, copyright could be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt. . . . *That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs' rights.*[114]

The implication of this statement is clear. If a work results from the intellectual labor of the author, it will gain copyright protection as long as the author has achieved something beyond "the narrowest and most obvious limits."[115] A work can surmount these limits merely by the fact that others seek to

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109. *See* Higgins v. Keuffel, 140 U.S. 428, 431 (1891) ("To be entitled to a copyright the article must have by itself some value as a composition, at least to the extent of serving some purpose other than as a mere advertisement or designation of the subject to which it is attached."); J.L. Mott Iron Works v. Clow, 82 F. 316, 318 (7th Cir. 1897) (holding that a work "must have, by and of itself, some value as a composition" to be copyrightable).

This requirement of merit apparently arose from the *Sarony* Court's concession that ordinary photographs might not be copyrightable. *See supra* note 106 and accompanying text. By making this suggestion, the *Sarony* Court implied that photographs which did not display an unusual degree of art lacked sufficient originality to gain copyright protection.

110. 188 U.S. 239 (1903).

111. *Id.* at 248.

112. *Id.* at 252-53 (dissenting opinion).

113. *Id.* at 250. The Court noted that the posters were the artists' representations of scenes from the plaintiff's circus. Thus, there was "no reason to doubt that these prints in their *ensemble* and in all their details, in their design and particular combinations of figures, lines and colors, are the original work of the plaintiffs' designer." *Id.*

114. *Id.* at 251-52 (emphasis added).

115. *Id.* at 251.

reproduce the work. Future cases cemented the minimal nature of this requirement.

In *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*,[116] the plaintiff successfully claimed protection for engraved reproductions of master paintings already in the public domain. Since the plaintiff was not the author of the paintings themselves, the only conceivably copyrightable element of the plaintiff's reproductions lay in any changes made by the engraver. These variations were slight, for the mezzotint process used to make the reproductions revolved around an attempted literal duplication of the original masters' works.[117] The defendant contended that these facts rendered the engravings insufficiently original to support a copyright claim.

Despite these facts, the Second Circuit held in the plaintiff's favor. The court indicated that even though the plaintiff's engravers were copying the masters' originals, the unintended variations from the public domain works were sufficiently "original" to support copyright. This philosophy was captured by the court's statement that "[a] copyist's bad eyesight or defective musculature, or a shock caused by a clap of thunder, may yield sufficiently distinguishable variations. Having hit upon such a variation unintentionally, the 'author' may adopt it as his and copyright it."[118]

The development of copyright's low standard of originality sets the backdrop against which to consider the idea/expression dichotomy. At first blush, the minimal nature of originality suggests that an author can claim property rights in practically everything she creates. However, copyright has never given authors complete control over all fruits of their mental labor.[119] Even though

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116. 191 F.2d 99 (2d Cir. 1951).

117. *Id.* at 104.

118. *Id.* at 105. An extreme example of the minimal nature of originality is the case of West Publishing Co. v. Mead Data Central, Inc., 799 F.2d 1219 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987). That case involved West's claim that defendant Mead had infringed West's copyright in its well known law reporters by means of Mead's so-called "star pagination" system. *Id.* at 1221. That system provided customers of Mead's Lexis computer research service with the exact West page number on which a given screen of case text appeared. *Id.* at 1222. West sought a preliminary injunction against Mead's introduction of the "star pagination" system on the ground that Mead's use of West's page numbers constituted the appropriation of copyrightable subject matter. *Id.* The District Court held in favor of West. *Id.* On appeal, Mead argued that West's case amounted to a claim to page numbers and should therefore be denied because the page numbers could not possibly be the result of original authorship. *Id.* at 1223, 1227. The Eighth Circuit disagreed. First, the court found that West could properly copyright the arrangement and sequence of the cases found in its reporters. *Id.* at 1226. Second, the court found that Mead's borrowing of the page numbers should be enjoined because Mead's Lexis users would otherwise gain "a large part of what West has spent so much labor and industry compiling . . ." *Id.* at 1227. For an extensive discussion and perceptive criticism of the *West Publishing* decision, see Patterson & Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719 (1989).

119. Not surprisingly, the degree of borrowing prohibited by copyright has grown alongside the scope of copyrightable subject matter. Early American copyright statutes adopted a very limited view of infringement. As a general rule, infringement occurred only through the unauthorized printing, publishing or sale of a copyrighted work. Not until 1909 did "copying" become an infringement of all types of copyrighted works. *See* Patterson, *supra* note 49, at 1185-89. For a look at cases which illustrate the growth of protection given to copyrighted works, *compare* Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901) (refusing to find infringement despite verbatim copying of 388 out of 866 pages from plaintiff's copyrighted work) *and* Stowe v. Thomas, 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (No. 13,514) (refusing to find defendant's German translation an infringement of Harriet Beecher Stowe's UNCLE TOM'S CABIN), *with* Daly v. Palmer, 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868) (No. 3,552) (finding infringement in the defendant's use of a scene in which villain ties his victim to railroad tracks

most works qualify for some degree of copyright protection, certain facets of each work may be freely copied by others. The primary device by which this result has been reached is the idea/expression dichotomy.[120]

Although references to the concept can be seen in earlier cases,[121] the most influential case construing the idea/expression dichotomy is *Nichols v. Universal Pictures Corp.*,[122] in which the Second Circuit considered whether the defendant's play *The Cohens and The Kellys* infringed the plaintiff's play *Abie's Irish Rose*. Both plays shared numerous similarities. The plots centered around the marriage of Jewish and Irish children, the tensions between the families, the birth of grandchildren, and the reconciliation of the families through good fortune.[123] However, there were differences as well. In one play, differences in wealth caused the interfamilial tension. In the other, religious zealotry was the cause. In one play, the grandchildren played little role in the reconciliation, while in the other the grandchildren played a major role.[124]

The court used the idea/expression dichotomy to limit the scope of possible infringement. In a now famous passage, Judge Learned Hand formulated the so-called "levels of abstractions test":

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent

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only to have the hero perform a last minute rescue). *Daly* is apparently the first case which recognizes an abstract claim of copyright. Ebenstein, *Introduction* to S. ROTHENBERG, COPYRIGHT LAW at xxii (1956).

Presently, the copyright statute grants five exclusive rights to the copyright holder: the right to reproduce the copyrighted work in copies or phonorecords, the right to prepare derivative works based on the copyrighted work, the right to distribute copies of the copyrighted work, the right to perform the copyrighted work, and the right to display the copyrighted work. 17 U.S.C. § 106 (1988). Interference with any of these rights may be considered copyright infringement. 17 U.S.C. § 501(a) (1988). Generally, proof of infringement via copying is generally accomplished in one of two ways. First, the plaintiff may introduce direct evidence of copying by the defendant from the plaintiff's copyrighted work. *See* Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946). Second, the plaintiff may prove her case circumstantially by showing that the defendant had access to the plaintiff's work, and that the defendant's work is substantially similar to the plaintiff's work. Ferguson v. Nat'l Broadcasting Co., 584 F.2d 111, 113 (5th Cir. 1978); Novelty Textile Mills, Inc. v. Joan Fabrics Corp., 558 F.2d 1090, 1092 (2d Cir. 1977). This second route is often taken because plaintiffs rarely have eyewitness or other direct evidence of copying. The logic behind the "access plus substantial similarity" test is that the defendant is likely to have copied from the plaintiff's work if the defendant saw the plaintiff's work and also produced a work which contains so many similarities to the plaintiff's work that the similarities could only have resulted from copying. Once the plaintiff has introduced evidence which establishes this likelihood of copying, the defendant assumes the burden of explaining the similarities through some benign cause. *See* Hebert v. Wicklund, 744 F.2d 218 (1st Cir. 1984).

120. Other devices include the useful article doctrine, which denies copyright protection to utilitarian works or utilitarian aspects of works, and the fair use doctrine, which protects certain types of borrowing that might otherwise be considered infringement. *See* 17 U.S.C. § 101, 107 (1988); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (home recording of television programs for purposes of time shifting held not infringement under fair use doctrine); Esquire, Inc. v. Ringer, 591 F.2d 796 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 908, *reh'g denied*, 441 U.S. 917 (1979) (overall shape of street light not copyrightable under useful article doctrine).

121. Baker v. Selden, 101 U.S. 99 (1879); Greene v. Bishop, 10 F. Cas. 1128, 1133 (C.C.D. Mass. 1858); Stowe v. Thomas, 23 F. Cas. 201, 206 (C.C.E.C. Pa. 1853) (No. 13,514).

122. 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

123. *Id.* at 120-21.

124. *Id.* at 121-22.

> the use of his "ideas," to which, apart from their expression, his property is never extended.[125]

When this reasoning was applied to the case before the court, Hand found that the similarities between the plays were only similarities of idea. The court therefore found no infringement.[126]

For our purposes, the importance of *Nichols* lies not so much in its actual result as in its approach to copyright. By holding that the plaintiff's copyright did not extend to the plot outline described, the court divided the plaintiff's work into two parts—the uncopyrightable "idea," and the copyrightable "expression" of that "idea."[127] Thus, an author's uncopyrightable ideas could always be borrowed, and future infringement cases could be decided by asking whether or not the defendant had borrowed ideas or expressions from a plaintiff's copyrighted work. Furthermore, the *Nichols* opinion suggested that one could make a general assessment of whether a defendant had borrowed ideas or expressions by measuring the degree of abstraction inherent in the defendant's borrowing.[128] If the defendant borrowed literally from the plaintiff's work, then a finding of infringement would follow. By contrast, if a defendant borrowed only vague and abstract features from the plaintiff, no such finding would be made.[129] Over time, this approach came to dominate our analysis of copyright infringement.[130]

2. *Natural Law in Modern Copyright Doctrine*

So far, this section has described the development of copyright's general shape since *Wheaton v. Peters*. Although our early notions of copyright were very limited, copyright now protects nearly all creations of an author's mind,[131] subject to the limitation of the idea/expression dichotomy. Brief reflection reveals the close relationship between this copyright regime and the natural law of property through labor and possession.

For example, the natural law tradition that property is the necessary moral consequence of a person's labor accurately describes our present doctrine that copyright protects creations of an author's mind. As Locke pointed out, if a person owns her labor as a matter of inherent right, then that person should

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125. *Id.* at 121.

126. *Id.*

127. *See* Mazer v. Stein, 347 U.S. 201, 217, *reh'g denied*, 347 U.S. 949 (1954), in which the Supreme Court noted that "a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—not the idea itself."

128. Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

129. *Id.* at 122.

130. *See, e.g.*, Reyher v. Children's Television Workshop, 533 F.2d 87, 90 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976) ("It is an axiom of copyright law that the protection granted to a copyrightable work extends only to the expression of an idea and never to the idea itself."). *See also* Atari, Inc. v. North Am. Philips Consumer Electronics Corp., 672 F.2d 607, *cert. denied*, 459 U.S. 880 (1982); M. NIMMER & D. NIMMER, *supra* note 88, § 13.03[A][1].

131. It is worth mentioning here that these creations must also be "fixed" before copyright protection attaches. *See infra* note 142.

own the fruits of that labor as well.[132] Under this reasoning, an author owns her mind's labor, and must also own the creations of that labor, no matter how humble or accidental the result.

The appropriateness of this reference to natural law becomes even more clear when one considers the fact that copyright law protects works for which no economic incentive is required to induce creation. For example, copyright undoubtedly protects works authored by students to fulfill academic requirements.[133] Similarly, copyright protects the results of accidents[134] and products which the government requires public utilities to print.[135] If economic necessity were truly the only motivation for copyright, we would remove copyright protection from these works and any others which would be produced in the absence of copyright. Granting these works copyright induces no economic gain. If anything, economic welfare would increase if the public gained free access to these works through a denial of copyright. Our reluctance to take such a course of action demonstrates the natural law vindication of an author's creation in our copyright law.[136]

The natural law roots of the idea/expression dichotomy are even more striking. As noted previously, modern doctrine identifies ideas as more abstract than expressions.[137] This distinction speaks directly to natural law doctrines of

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132. J. LOCKE, *supra* note 38, §§ 27-28.

133. As noted previously, copyright protects all works which are the fruits of an individual's mental labor. Neither this principle, nor its codification in section 102(a) of the Copyright Code, contains an exclusion for academic works.

134. *See supra* notes 116-18 and accompanying text.

135. Hutchinson Tel. Co. v. Fronteer Dir. Co. of Minn., 770 F.2d 128, 132 (8th Cir. 1985) (finding "nothing in the Copyright Act to support the District Court's conclusion that [plaintiff] Hutchinson's directory is excluded from copyright protection on the ground that Hutchinson is required by law to publish a directory."). Interestingly, the Copyright Code excludes works of the United States government. 17 U.S.C. § 105 (1976).

136. Although it is outside the scope of this Article to go beyond judicial interpretation of basic copyright concepts, congressional enactments also contain references to the natural law.

Most significantly, recent United States adherence to the Berne Convention implies legislative recognition of copyright's natural law dimensions. For example, the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988), eliminated certain formal prerequisites to copyright protection. In particular, notice of copyright is no longer required to keep a work from falling into the public domain. *Id.* § 7, (amending 17 U.S.C. §§ 401-02 (1976)). Although minor, such a change suggests a natural law orientation because it seemingly codifies the notion that copyright is the inevitable consequence of an author's creative labor. This orientation is further supported by article one of the Berne Convention, which states, "The countries to which this Convention applies constitute a Union for the protection of *the rights of authors* in their literary and artistic works." Berne Convention for the Protection of Literacy and Artistic Works, art. 1 (as revised July 24, 1971) (emphasis added). Adherence to such language certainly implies recognition of the the fact that something more than economic convenience supports copyright.

Further reference to natural law exists in section 801 of the 1976 Copyright Code. That section creates the independent Copyright Royalty Tribunal which adjusts royalty rates paid under compulsory licensing of copyrighted works. 17 U.S.C. §§ 801-02, 801(b)(2) (1976). Although section 801 recognizes economic objectives for the Tribunal, it also commands the Tribunal "[t]o afford the copyright owner a fair return for his creative work . . ." *Id.* § 801(b)(1)(B) (1976). Such language clearly demonstrates something less than a purely economic outlook on copyright law, for considerations of fairness are not part of a blind pursuit of efficiency.

Finally, sections 201(e), 203 and 304(c) of the Copyright Code (which deal with involuntary transfers and the termination of transfers) seem grounded in natural law, and not economics. *See* P. GOLDSTEIN, COPYRIGHT, vol. 1, at 9 (1989); H.R. Rep. No. 94-1476, 98th Cong., 2d Sess., at 123 (1976) ("The purpose of [section 201(e)] is to reaffirm the basic principle that the United States copyright of an individual author shall be secured to that author . . .").

137. Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 292 U.S. 902 (1931).

inherent possessability. Expressions such as the text of a work are the proper subject of copyright because they are sufficiently concrete for the law to transform them into property. By contrast, ideas are so incorporeal that the law simply cannot make them into property.[138]

The natural law ancestry of the idea/expression dichotomy is confirmed when one considers the judicial precedent on which Learned Hand rested his levels of abstractions test. In *Nichols*, Learned Hand cited directly to page eighty-six of the Supreme Court case of *Holmes v. Hurst*,[139] where the Court states as follow: "[t]he right thus secured by the copyright act is not a right to the use of certain words, because they are the common property of the human race, and are as little susceptible of private appropriation as air or sunlight."[140]

The *Holmes* Court further cited to the English case of *Jefferys v. Boosey*,[141] where Mr. Justice Erle wrote the following:

> The subject of property is the order of words in the author's composition; not the words themselves, they being analogous to the elements of matter, which are not appropriated unless combined, nor the ideas expressed by those words, they existing in the mind alone, which is [*sic*] not capable of appropriation.[142]

The recognition of copyright's natural law heritage demonstrates a clear contradiction between the modern economic model of copyright and copyright's actual description. Although economic analysis has undoubtedly affected copyright development, copyright's basic concepts appear tied to the natural law of property. In turn, this shows that copyright is based on something more than mere economic efficiency, and that we should restore natural law to our copyright jurisprudence to reflect this broader perspective. Indeed, failure to take such a course of action places copyright theory at odds with judicial practice.

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138. The origin of this notion can be traced directly to Roman times. In an apparent reference to *res communes*, the Roman Seneca stated that "ideas are common property." Epistles 12, 11 as quoted in M. NIMMER & D. NIMMER, *supra* note 88, § 16.01 n.4. *See also* 7 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 480 (1926) ("according to Roman law, occupatio, being founded on possessio, and only corporeal things being capable of possessio, it was only corporeal things which could be thus acquired.").

The English adoption of this reasoning can be clearly seen in Justice Yates' dissenting opinion in *Millar* in which he wrote the following:

> The claim is to the style and ideas of the author's composition. And it is a well known and established maxim, (which I apprehend holds as true now, as it did 2000 years ago,) 'that nothing can be an object of property, which has not a corporeal substance.'

98 Eng. Rep. 201, 232 (1769). Justice Yates further bolstered his argument with a reference to *ferae naturae*. *Id.* at 233.

139. 174 U.S. 82 (1898).

140. *Id.* at 86.

141. 10 Eng. Rep. 681 (1854).

142. *Id.* at 702. Further confirmation of the inherent unpossessability of ideas can be found in Desny v. Wilder, 46 Cal. 2d 715, 731 (1956), in which the court wrote that "ideas are free as the air."

Further evidence of modern copyright's concern with possession can be seen in the requirement of "fixation." Under section 102(a) of the Copyright Code, copyright extends to "original works of authorship," but only if "fixed in any tangible medium of expression." 17 U.S.C. § 102(a) (1988). In other words, a work must be captured in some fashion which enables the work to be "perceived, reproduced, or otherwise communicated." *Id.* This is accomplished if a work is written down, captured on audio or video tape, or placed on a computer disk. *See* H.R. REP. No. 94-1476, 94th Cong., 2d Sess. 52 (1976). Although this condition is easily met, it does prevent statutory copyright from protecting works which are not physically recorded in some fashion. The logic behind the requirement is clear. Without reduction to a physically tangible form, possession is not possible, and property will not be recognized. *See* Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 83 n.44 (1985).

This may decrease the value of insights gained from copyright theory. Of course, one might also take the position that we should extinguish the natural law facets of our present copyright doctrine in favor of the economics-only model constructed earlier. However, grave difficulty confronts such a course of action, for economics is simply too blunt a tool to successfully prescribe all of copyright law.

II. THE SHORTCOMINGS OF ECONOMIC ANALYSIS

The normative use of economics in copyright suffers from, among other things, the problems inherent in defining and measuring society's welfare. To be sure, certain components may be known in a general fashion, but constructing a scale which successfully measures the existence and value of each of these components is impossible. Indeed, the very construction of such a scale would certainly involve the identification and evaluation of rights implicit in natural law reasoning. This realization alone weakens the basis for grounding copyright theory in economics alone.[143] Nevertheless, two methods for dealing with this problem have been proposed and might be used to evaluate copyright law. However, even if one of these methods were deemed desirable, it alone could not guide all of the decisions we must make in shaping our copyright law. In other words, an economic analysis of copyright cannot be implemented without also considering the natural law.

A. *Pareto Optimality*

The first of these methods uses the concepts of Pareto superiority and Pareto optimality. Situation A is Pareto superior to situation B if in situation A: 1) at least one person is better off than she was in situation B and 2) no one is worse off than he was in situation B. Situation A is Pareto optimal if no Pareto superior positions to it exist. In other words, situation A is Pareto optimal if no person can be made better off without making at least one other person worse off.[144]

At first blush, the Pareto principle seems an attractive way out of the problems which face the economic analysis of copyright. Since Pareto superior moves involve gains for some and losses for none, they increase welfare by definition. The right series of Pareto superior copyright improvements would therefore lead to the best of all possible copyright regimes. Unfortunately, closer examination reveals the fallacy of naked obeisance to the Pareto principle.

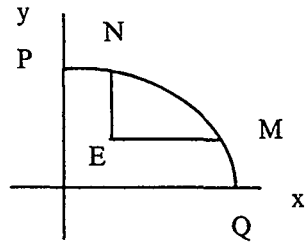
First, the Pareto principle does not lead to one Pareto optimal solution. Thus, even if a Pareto optimal situation has been identified, Paretianism says nothing about whether that situation is preferable to any other Pareto optimal solution. Second, the Pareto principle is not capable of comparing all possible situations against one another. If a proposed change improves the welfare of one

143. For another exploration of the problems associated with basing copyright solely on economics, see Gordon, *supra* note 3, at 1435-68.

144. J. COLEMAN, MARKETS, MORALS AND THE LAW 97-98 (1988).

group at the expense of another, it is neither Pareto superior nor Pareto inferior to the existing status quo. In such situations of Pareto noncomparability, the Pareto principle has no preference for one scheme over another.

The above described problems follow from consideration of the following diagram. Let the x and y axes represent the welfare of individuals (or groups of individuals) A and B respectively. Let the point E represent the existing distribution of the resources available to A and B. From this construction, we can see that all points to the "northwest" of E are Pareto superior to E, and all points to the "southwest" are Pareto inferior to E.[145] Of course, there is at some point a limit to the welfare that can be derived from the resources in this society. The frontier of this welfare is represented by the curve PQ. Indeed, the set of points represented by PQ is the set of all Pareto optimal distributions.[146]



The first problem with relying solely on Paretianism follows easily from this diagram. Since PQ represents the set of Pareto optimal distributions, our hypothesized society must choose where along PQ to allocate its resources. However, the Pareto principle is incapable of choosing among these points because each of the points on PQ is neither Pareto superior nor Pareto inferior to the other points on PQ. For example, group B is better off at point N than it is at point M. Conversely, group A is worse off at point N than it is at point M. Thus, point N can be considered neither Pareto superior nor Pareto inferior to M. Society's preference for a particular distribution along PQ must therefore be based on principles other than Pareto superiority and Pareto optimality.[147]

The second problem follows quickly as well. Since our society is presently at point E, the possible Pareto superior results are contained in the pie slice bounded by EMN. The possible Pareto optimal points to choose from are therefore contained on the subset of PQ marked MN. Points not on MN cannot be considered because they are Pareto noncomparable to E.[148] This shows that the

145. Points to the "northwest" of E are Pareto superior because they represent points at which the welfare of both A and B is increased or unchanged. Similarly, points to the "southwest" of E are Pareto inferior because they represent points at which the welfare of both A and B is decreased or unchanged. By contrast, other points are considered Pareto noncomparable to E because the welfare of one group is improved at the expense of the other.

146. Points which are either Pareto superior to the points on PQ must be to the "northwest," of PQ. Since no such points exist, the points of PQ must be Pareto optimal.

147. *See* J. RAWLS, A THEORY OF JUSTICE 67-69 ("The principle of [Pareto] efficiency does not by itself select one particular distribution of commodities as the efficient one. To select among the efficient distributions some other principle, a principle of justice, say, is necessary.").

148. It must be remembered that the Pareto principle cannot compare point E with points not on MN because those points are neither to the northwest or southwest of E.

Pareto principle eliminates many possible Pareto optimal arrangements simply because the excluded arrangements cannot be Pareto compared to the status quo. Since these excluded points are Pareto optimal, they are—by definition—one of the arrangements of society's resources that must be considered as desirable as the ones included on MN. Their exclusion is unwarranted unless some other theory such as natural law justifies the existing arrangement at point E.

The foregoing analysis has demonstrated that Paretianism alone is not capable of prescribing a single regime of copyright. First, Pareto reasoning implies more than one optimal arrangement. Second, the possible arrangements are selected over other equally Pareto desirable arrangements only because they are compatible with the preexisting, unjustified arrangement. A principle other than Paretianism is therefore required to justify an initial arrangement and select from the remaining Pareto optimal solutions.

B. *Wealth Maximization*

The second suggested method of measuring social welfare uses the concept of wealth as its scale. Adherents to this view would select the copyright regime which maximized society's total wealth,[149] regardless of its distribution.[150] This method seems peculiarly compatible with copyright's basic economic theory. New authorship spurred by copyright adds to society's wealth by creating new works of value. These gains are then compared against the losses imposed by copyright. The optimal degree of copyright protection is that regime which maximizes the difference between the economic gains and losses caused by copyright.[151]

The allure of this analysis is plain. It offers a theoretically unique, determinate result to the difficult problem of how far to extend copyright. All that is required is sufficient economic knowledge to gather the information necessary to compute society's wealth. Beyond that, a simply mechanical determination leads us to the maximization of society's welfare.

Unfortunately, closer examination of wealth maximization reveals its flaws. At the very outset, serious ethical problems surround the choice of wealth as the sole measure of societal welfare. Although wealth is certainly something that

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149. The leading proponent of this analysis, Judge Richard Posner, defines wealth as the following:

> [T]he value in dollars or dollar equivalents . . . of everything in society. It is measured by what people are willing to pay for something or, if they already own it, what they demand in money to give it up. The only kind of preference that counts in a system of wealth maximization is thus one that is backed up by money—in other words, that is registered in a market.

Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 119 (1979).

150. This concept is sometimes referred to as Kaldor-Hicks efficiency. Under this conception, situation A is Kaldor-Hicks superior to situation B if in situation A: 1) at least one person is better off than she was in situation B and 2) those persons who are better off in situation A (the "winners") are capable of retaining some of their gains while compensating those who have become worse off in situation A (the "losers"). In other words, situation A is Kaldor-Hicks superior to situation B if situation A is potentially Pareto superior to situation B. *See* Fisher, *supra* note 3 at 1699; J. COLEMAN, *supra* note 144, at 98-100.

151. Indeed, economically oriented copyright analysts often adopt the concept of Kaldor-Hicks efficiency as copyright's touchstone. *See, e.g.*, Fisher, *supra* note 3, at 1703, 1717; Landes & Posner, *supra* note 3 at 326.

society values, it is not the only thing that society values.[152] Thus, if wealth maximization truly identifies the optimal social order, it must do so because a society which maximizes wealth necessarily observes all other values worth recognizing.[153] In my view, such an assumption is patently unrealistic. Since wealth maximization responds only to those values which are backed up by money in a market,[154] there is simply no reason to believe that a society which values wealth will also properly respect values which are not bought and sold such as freedom[155] and privacy.[156]

Even if these ethical problems are overlooked, there is little reason for copyright analysts to put all of their faith in wealth maximization. First, pursuit of wealth maximization requires information which is simply not available. Second, wealth maximization's reliance on prices raises the risk of fatal indeterminacy. Third, wealth maximization often justifies whatever set of entitlements is proposed.

1. *Lack of Information*

The normative use of wealth maximization in copyright proceeds as follows.[157] First, a judge must identify all of the work's potential uses.[158] Second, the judge must rank the possible uses in order of the relative costs and benefits of allowing them.[159] This involves, among other things, determining how changes in copyright law might motivate authors to write, ascertaining the market behavior of potential defendants and consumers of each potential infringing use, and evaluating other uses to which authors might put their labors.[160] Finally, the judge must select the copyright law which maximizes the benefits of copyright protection over the associated losses.[161]

Brief reflection reveals the practical impossibility of undertaking such an endeavor. No judge (or legislature, for that matter) could ever identify all of the possible uses of a work. Moreover, the empirical information necessary to

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152. *See* Dworkin, *Is Wealth a Value?* 9 J. LEGAL STUD. 191 (1980).

153. *See* J. COLEMAN, *supra* note 144, at 112 ("If the pursuit of wealth is a good, it must be because pursuing wealth promotes other things of value.").

154. *See supra* note 149.

155. This is most vividly illustrated by the many commentators who point out that wealth maximization may well justify slavery. *See, e.g.*, Dworkin, *supra* note 152, at 208-10. *See also* Bebchuck, *The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?*, 8 HOFSTRA L. REV. 671, 687-88 (1980).

156. Even economists have questioned the ethical wisdom of using wealth maximization as society's normative criterion. *See* E.J. MISHAN, THE ECONOMIC GROWTH DEBATE 36 (1977) ("[W]ho doubts that the wealthier and economically more efficient society can also be the less healthy, the less honest, the less secure and the less contented?"); Rizzo, *The Mirage of Efficiency*, 8 HOFSTRA L. REV. 641, 646 (1980) (pointing out that markets do not reflect the value of moralisms).

157. A detailed analysis of this process was recently presented by Professor William Fisher in his article *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1698-744 (1989). Professor Fisher also provides a utopian theory of copyright law based upon his vision of an ideal society. *Id.* at 1744-95. To the extent that Professor Fisher's work points out the shortcomings of wealth maximization and the necessity for some other approach to copyright, I am in agreement. To the extent that Professor Fisher supports the sole reliance upon wealth maximization to guide copyright, I disagree.

158. *Id.* at 1706.

159. *Id.* at 1707.

160. *Id.* at 1705-17.

161. *Id.* at 1716-17.

calculate the effect of copyright law on the actions of authors, potential defendants, and consumers is simply unavailable, and is probably uncollectible.[162] Without this information, we cannot predict whether a given change in copyright will even increase production of works,[163] let alone increase social welfare.[164] The problem becomes even worse when simplifying assumptions are removed.[165] Consequently, there is little justification for placing all of our faith in economic analysis as a workable method for shaping copyright in any meaningful fashion.[166]

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162. *See* Litman, *supra* note 24 ("Most arguments over the appropriate scope of copyright protection, unfortunately, occur in a realm in which empirical data is not only unavailable, but is literally uncollectible."); Perlman & Rhinelander, Willams & Wilkins Co. v. United States*: Photocopying, Copyright, and the Judicial Process*, 1975 SUP. CT. REV. 355, 373-79 ("The difficulties with utilizing economic theory to justify the creation of a judicial privilege to copy copyrighted works is that neither a theoretical nor an empirical basis exists upon which to evaluate the claims of either party.").

163. In order to calculate whether or not an increase in copyright protection really will stimulate creative activity, an economist would require an accurate model of authors' motives for writing. *Cf.* Auten, Burman, & Randolph, *Estimation and Interpretation of Capital Gains Realization Behavior: Evidence from Panel Data*, 42 NAT'L TAX J. 353 (1989) ("Absent a clear behavioral model, econometric analysis is as much art as science and artistic interpretations clearly vary on this subject."). Describing and analyzing these motives seems impossible. Besides the possibility of copyright benefits, authors' motives presumably include desire for fame, politics, and non-copyright monetary benefits. Their relative importance would have to be established for the authors of every type of copyrightable work. *See* Hurt & Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECON. REV. 420, 425-26 (1966). The modeling of authors' behavior is further complicated by the fact that individuals apparently do not value equivalent economic options consistently. *See* Tversky & Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453, 457 (1981).

164. One might attempt to equate the production of more works with an increase in social welfare. Such an assumption is not necessarily valid, for increased production of works induced by copyright implies a diversion of resources from other sectors of the economy to the creation of copyrightable works. Thus, the production of more copyrightable works increases social welfare only if the increased production is more valuable than the use which previously occupied the diverted resources.

165. Despite presenting a model for use of the wealth maximizing copyright model, Professor Fisher himself noted:

> If we removed the simplifying assumptions, limited the judge's investigatory power, and burdened him with other cases, it would be ludicrous, surely, to ask him to undertake an inquiry like the one outlined above. Perhaps. It is hard to imagine a judge making even rough guesses at some of the figures critical to the calculus. Especially implausible are the notions that he would be able, or willing, to ascertain the universe of ways in which copyrights in the type of work before him are susceptible of being infringed and that he could estimate the effects of different levels of remuneration on the future production of works of that sort.

Fisher, *supra* note 3, at 1718-19.

166. Indeed, Professor George Priest has characterized the economic analysis of patent law as "one of the least productive lines of inquiry in all of economic thought." Priest, *What Economists Can Tell Lawyers*, in RESEARCH IN LAW & ECON., vol. 8, at 19 (J. Palmer & R. Zerbe, eds. 1986). In Priest's view, this problem arises because "[t]he ratio of empirical demonstration to assumption in this literature must be very close to zero." *Id.* He concludes that "[t]he inability of economists to resolve the question of whether activity stimulated by the patent system or other forms of protection of intellectual property enhances or diminishes social welfare implies, unfortunately, that economists can tell lawyers ultimately very little about how to enforce or interpret the law of intellectual property." *Id.* at 21. Under these conditions, "economic analysis is very hard to distinguish in practice from applied moral philosophy." *Id.* at 22.

Professor Peter Menell's thoughtful economic analysis of computer programs and copyright provides an example of the problems to which Professor Priest alludes. *See* Menell, *supra* note 3. Professor Menell takes the position that courts should strongly limit the protection of computer program code. *Id.* at 1084-88. The article proceeds by identifying a number of costs associated with extending copyright to computer code. The article contends that these costs justify the proposed limits on copyright because legal and economic factors besides copyright provide sufficient incentives to assure the optimal production of desired programs. *Id.* at 1079-84.

Although I am in sympathy with Professor Menell's conclusion, his analysis is incomplete because he fails to assess the possibility of extending copyright protection for computer programs beyond his proposal. In particular,

2. *Changing Prices and Endowment Effects*

Theoretical problems also beset the normative use of wealth maximization. These problems arise when we take account of the fact that a society's prices change as entitlements like copyright are shifted. These changing prices mean that wealth maximization may be incapable of selecting an optimal copyright scheme even if the practical problems identified above disappear.

In the most striking case, price changes caused by a wealth maximization policy suggest a never ending flip flop of rights in which copyright is expanded and contracted as the relative prices of intellectual products change.[167] For example, consider a society in which books and movies on video cassette are valued in the following manner. If 100 books are authored in a given year, then the books are valued at $2 each. If 200 books are authored, their prices reflect the increased supply of books and the price falls to $1 each. Similarly, if 100 movies on video cassette are produced, their price is $2 each, but if 200 are produced, the price falls to $1 each. Let situation A denote the production of 100 books and 200 movies, and let situation B denote the production of 200 books and 100 movies.

Suppose that in situation A, the law permits the free production of video cassette movies from books. Under this regime, 100 books and 200 video cassette movies are produced. Since the 100 books sell for $2 each and the 200 movies for $1 each, society's wealth from this output is $400. Suppose further that if the law were changed to prohibit the free video cassette movie production from books, situation B would result. The production of books would rise to 200, and the production of movies would fall to 100.[168] At these prices, the contemplated change in the law would increase society's wealth to $500.[169] A copyright regime based upon wealth maximization would therefore adopt the change.

Unfortunately, the apparent increase in society's wealth is temporary, at best. Once the change was made, the production of books would rise to 200, and the production of movies would fall to 100. The new relative abundance of books, coupled with the relative scarcity of movies would cause a change in

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he apparently assumes that the only incentive required to spur authorship of computer programs is the recovery of development costs. The relative ease of recovering these costs through means other than copyright leads to the conclusion that most computer programs would be authored in the absence of legal protection. *Id.* at 1060, 1080-81. This assumption overlooks the possibility that extending copyright beyond Professor Menell's limits would attract even more resources to the authorship of computer programs. These resources would presumably produce a socially desired increase in authorship.

Of course, it is possible that costs of extending copyright beyond Professor Menell's proposal would outweigh any concomitant benefits. However, in the absence of detailed information about the preferences of producers and consumers of computer programs, the economic validity of Professor Menell's position or any alternative remains a matter of conjecture. As I later discuss, natural law provides alternate justifications for limiting copyright's reach. *See infra* notes 187-238 and accompanying text.

167. This phenomenon is explained by the so-called Scitovsky Paradox. *See* Scitovsky, *A Note on Welfare Propositions in Economics*, 9 REV. ECON. STUD. 77 (1941).

168. The drop in movie production would occur because the cost of producing movies would increase as authors enforced their new rights under the law. Similarly, the extra economic incentives to authors would stimulate further authorship.

169. 200 books at $2 each + 100 video cassette movies at $1 each = $500.

prices. Based upon these new prices, society's wealth would fall back to $400.[170] Even worse, the new prices in situation B imply a change back to the old law of situation A. At the prices prevalent in situation B, a return to situation A would increase society's wealth to $500.[171] However, prices would soon change again, thereby causing yet another move to situation B.

A similar, but different, problem occurs when attention is focused on the endowment effects of copyright. Endowment effects are the result of the well known fact that the price a person is willing to pay for an entitlement is generally less than what she will sell the entitlement for once she owns it.[172] Since those who own entitlements such as copyright are likely to value them more than those who do not, the wealth maximizer naturally prefers to assign rights according to the status quo. This turns wealth maximization into a normative principle which tends to justify whatever status quo is proposed.[173]

Consider proposal C. If proposal C is adopted, the producers of records own the right to make cassette tapes from the records they produce. Producers value this right at $200 because this is the additional revenue that they can gain by making and selling cassette tapes to the consumers of tapes. Suppose further that consumers would be willing to buy the rights of making cassette tapes, but only if the price were $190 or less. In this hypothesized situation, proposal C seems clearly wealth maximizing and should be adopted. Since producers value the right more than consumers do, wealth is maximized by assigning the right to producers.

For purposes of comparison, now consider proposal D, which is the opposite of proposal C. Consumers now have the right to freely make cassette tapes from records. Because of endowment effects, consumers in situation D price the entitlement that they own more highly than the entitlement they did not own in situation C. Suppose that they consequently will not part with the right for anything less than $203. Under these facts, proposal D is preferable to proposal C, and should be adopted.

The foregoing analysis shows that although wealth maximization seems attractive, it is no more worthy of unswerving allegiance than is Pareto optimality. From a purely practical point of view, the huge amount of information required to make intelligent policy recommendations is not presently available, and it may never be available.[174] Furthermore, even if the information were available, there is simply no certainty that wealth maximization is capable of recommending a preferred course of action. First, wealth maximization's reliance on prices raises the risk that society will endlessly flip flop between com-

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170. Under the new prices, society would have 200 books at $1 each + 100 video cassette movies at $2 each = $400.

171. Society would then have 100 books at $1 each + 200 video cassette movies at $2 each = $500.

172. Endowment effects arise from many causes. In some cases, the increased welfare which results from owning an entitlement changes the marginal utility of each dollar to an individual. *See* E.J. MISHAN, COST-BENEFIT ANALYSIS 133-34, 424-25 (1976). In other cases, the phenomenon may be the result of cognitive processes. *See* Sunstein, *Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1151 (1986).

173. *Id.* at 140-41, 398-401; Rizzo, *supra* note 156, at 648-49.

174. *See supra* notes 157-66 and accompanying text.

peting alternatives.[175] Even if such a situation does not arise, endowment effects imply that the wealth maximizing society will often favor whatever initial assignment of rights is proposed.[176]

These conclusions have severe implications for present copyright jurisprudence. Since economic analysis is ineffective at distinguishing among the many initial assignments which may be proposed, its use as copyright's sole normative touchstone is demonstrably incomplete. If society is to choose between divergent copyright regimes which seem Pareto optimal or are backed as plausibly wealth maximizing, it must resort to some process of reasoning outside of economics. We cannot repair the descriptive contradiction between economics and copyright doctrine by simply clinging harder to a solely economic copyright jurisprudence.[177] Instead, we must directly confront the natural law tradition which already exists in our copyright law.

III. NATURAL LAW LIMITS ON COPYRIGHT LAW

Natural law's ubiquity within our copyright tradition makes it the logical candidate for dealing with the economic model's demonstrated inability to select or justify the initial entitlements to property which copyright law must define. First, the use of natural law would be consistent with copyright's general description. Second, natural law justifies the initial assignment of copyright to authors and suggests limits on the extent of those assignments.[178] This implies that a natural law perspective might be useful in defining the issues at stake in copyright law.

Despite the promise inherent in this proposal, the inclusion of natural law in modern copyright jurisprudence has encountered considerable resistance. Although some of this resistance is based upon the overstated position that copyright developed strictly as an economic instrument,[179] the real heart of the resistance comes from the belief that natural law implies an unprincipled expansion of authors' rights which will run amok over the public interest in free access to works.

Such fears are understandable. Locke's views on property stemmed from his assumption that persons owned their bodies.[180] They therefore owned the labor of their bodies and, by extension, the product of their labor.[181] This argu-

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175. *See supra* notes 167-71 and accompanying text.

176. *See supra* notes 172-73 and accompanying text.

177. In commenting on how an economist should proceed when confronted with inconsistent recommendations of the sort identified in this Article, economist E.J. Mishan has written, "In such cases, the proper thing for the economist to do is to reveal to the public these disparate results, along with any other relevant considerations such as equity or distributional impact. Economics alone cannot take him further." E.J. MISHAN, *supra* note 172, at 401. Mishan's statement elegantly captures the realization that society can successfully arrange its affairs only by venturing beyond the walls of economics.

178. *See supra* notes 27-44 and accompanying text.

179. As noted previously, there is ample support for the proposition that copyright developed in part as an economic social policy tool. *See supra* notes 3-14, 54-60, 78-81 and accompanying text. However, to state that copyright's economic heritage is its only heritage takes the proposition too far. Copyright has unmistakable natural law roots. *See supra* notes 132-42 and accompanying text.

180. J. LOCKE, *supra* note 38, § 27.

181. *Id.*, §§ 27-28.

ment seems peculiarly applicable to authorship. An author owns her body, and therefore her mind. When her mind labors, it seems that the resulting work is not just the product of the author's labor, it is practically an extension of the author herself. The book is therefore original, and it seems particularly appropriate to grant the author broad property rights in her book and all that it embodies.[182]

The standard response to these fears is the suppression of copyright's natural law dimensions in favor of the familiar economic model.[183] However, the shortcomings of economic analysis identified in this Article suggest that this suppression actually increases the likelihood of unprincipled expansion in copyright law by permitting unsophisticated notions about the connection between labor and property to drive judicial application of copyright law. If courts try to decide cases on economic principles, they necessarily find that those principles provide little guidance.[184] They are then forced to decide cases on something else, namely their unguided intuition about what is practical, fair and just. Since Lockean philosophy heavily influences our general intuition about property, the courts' unguided intuition often involves an uncritical use of natural law principles in which property follows labor. When this unguided intuition joins the plaintiff's economic argument that more copyright protection necessarily improves welfare by inducing more creative labor, the continued expansion of copyright would hardly seem surprising.[185]

The foregoing problem implies that a better way to prevent copyright's unlimited expansion is the careful development of a natural law copyright jurisprudence which recognizes the shortcomings of economics and uses natural law to surmount those problems. In particular, careful use of natural law principles creates a vibrant public domain which limits the unwarranted expansion of authors' rights. First, the practical notions embodied in the Roman notions of *res communes* and *ferae naturae* admonish the natural law thinker not to extend copyright beyond the bounds of what human institutions such as copyright can practicably accomplish. Second, the moral principles which suggest the extension of copyright also justify the dedication of authors' works to the public domain.[186]

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182. Indeed, it is generally assumed by many commentators that the use of natural law inevitably leads to the endless expansion of author's rights. The intuitive desire to limit copyright's scope is perhaps one reason that we have often insisted that natural law should be ignored in copyright jurisprudence. *Cf.* Patterson, *supra* note 49, at 1210.

183. *See* Patterson, *supra* note 49, at 1210 (rejecting natural rights theory as containing no limits on copyright's expansion). *See also* Abrams, *supra* note 57, at 1185-87.

184. *See supra* notes 145-77 and accompanying text.

185. Indeed, I would argue that we may already be observing the scenario outlined here in the seemingly arbitrary and expansive results of recent copyright cases. *Cf.* Yen, *supra* note 17, at 407-20, 432 n.197 for a description of copyright expansion and its economic support. *See infra* notes 190-206 and accompanying text for a description of the divergent results in modern copyright law.

186. It is worth reminding the reader that my purpose is not to finally settle the complete shape of modern copyright doctrine. Rather, my purpose is to demonstrate how the natural law creates a strong public domain. In so doing, I will necessarily have to consider some of the natural law's normative consequences. However, this consideration does not require a complete explanation for all facets of copyright law. Such a task is beyond the scope of this Article.

A. *Copyright and Possession*

The idea/expression dichotomy's roots in *res communes* and *ferae naturae* provide the most obvious way in which the natural law creates a public domain. As the reader will recall, these concepts prohibited property claims in those objects which were by nature difficult to possess. They therefore imply that copyright should not be extended to those facets of a work which are difficult to possess. Those facets should be placed in the public domain.

Understanding how possession limits copyright starts with a brief exploration of problems inherent in our present economic interpretation of the idea/expression dichotomy. Despite the seemingly sensible result of *Nichols v. Universal Pictures Corp.*,[187] future courts construing the idea/expression dichotomy had little luck in ascertaining copyright's limits. Even though Hand's levels of abstraction test became the dominant focus of future infringement cases,[188] the test itself suffered because it did not specify the level of abstraction which separated idea from expression. Future courts knew that ideas were less concrete than expressions, but they did not know where along this continuum to "draw the line."[189] Not surprisingly, this has resulted in a wide variance between copyright decisions. In some cases, courts have interpreted the idea/expression dichotomy so that a plaintiff finds it very difficult to prove infringement. In others, courts have made it easy for plaintiffs to recover.

For example, in *Eden Toys, Inc. v. Marshall Field & Co.*,[190] the Second Circuit considered the plaintiff Eden's claim that a stuffed snowman manufactured by the defendant Marshall Field infringed a similar snowman manufactured by Eden and previously sold to Marshall Field.[191] The features of the two snowmen were generally similar. Both resembled two snowballs stacked atop one another. They shared nearly identical dimensions, black button eyes approximately one-half inch in diameter, red buttons, black hats and scarves.[192] Eden claimed that these similarities proved copyright infringement.[193] The court disagreed.

In finding for the defendant, the court separated the ideas embodied in Eden's snowman from their expressions.[194] In the court's view, the idea of a snowman made of snowballs included the general shape, size, and features of the plaintiff's work.[195] Any similarities between the two snowmen were there-

187. 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931). This case is discussed *supra* at notes 122-30 and accompanying text.

188. Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1163 (9th Cir. 1977) ("No court or commentator in making this search has been able to improve upon Judge Learned Hand's famous 'abstractions test' articulated in Nichols v. Universal Pictures Corp.").

189. Indeed, Hand himself admitted that, "[n]obody has ever been able to fix that boundary [between idea and expression], and nobody ever can." *Nichols*, 45 F.2d at 121.

190. 675 F.2d 498 (2d Cir. 1982).

191. *Id.* at 499.

192. *Id.* at 500. The degree of similarity can be appreciated only by looking at pictures of the two snowmen. The pictures are printed at C. JOYCE, COPYRIGHT LAW 626-27 (1986).

193. *Id.*

194. *Id.*

195. *Id.*

fore similarities of idea, and not expression.[196] Thus, the plaintiff's claim had to be rejected.[197]

By contrast, in *Animal Fair, Inc. v. AMFESCO Indus.*,[198] the District Court of Minnesota considered two similar pairs of bedroom slippers which were made in the shape of a bear's paws.[199] The defendant argued that the plaintiff's claim was an attempt to monopolize the idea of slippers in the shape of a bear's paw.[200] This argument failed. Instead, the court held that the plaintiff sought only to protect its "fun-loving" and "whimsical"[201] expression of a bear's paw.[202] Since the defendant's slippers also captured a similar "total concept and feel," the court found that the defendant had infringed the plaintiff's artistic expression. In so ruling, the court specifically considered and disregarded various differences between the two pairs of slippers.[203] The court then entered a preliminary injunction in the plaintiff's favor.[204]

When one considers cases like *Eden Toys* and *Animal Fair*, it becomes apparent that our present interpretation of the idea/expression dichotomy suffers from the contrasting attitudes which one can bring to the separation of idea from expression. On the one hand, cases like *Eden Toys* indicate that even fairly concrete facets of a work are ideas. Thus, a plaintiff can prove infringement only by showing that the defendant borrowed verbatim a significant portion of the plaintiff's work. On the other hand, cases like *Animal Fair* imply that very nonliteral facets of a work are copyrightable. Therefore, a plaintiff can succeed even if the defendant's work bears only a superficial resemblance to the plaintiff's work.[205]

If our standard economic view of copyright is applied to this problem, no clear limits on the implications of cases like *Animal Fair* emerge. Those in

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196. *Id.*

197. *Id.* at 501.

198. 620 F. Supp. 175 (D. Minn. 1985), *aff'd without opinion*, 794 F.2d 678 (8th Cir. 1986).

199. *Id.* at 177. Photographs of these slippers may be found at A. LATMAN, R. GORMAN & J. GINSBURG, COPYRIGHT FOR THE NINETIES 428 (1989).

200. *Animal Fair*, 620 F. Supp. at 187.

201. *Id.* at 178.

202. *Id.* at 187.

203. *Id.* at 188.

204. *Id.* at 192.

205. An excellent example of this reasoning is Steinberg v. Columbia Pictures Indus., Inc., 663 F. Supp. 706 (S.D.N.Y. 1987). In that case, the plaintiff Steinberg sued the defendants for publishing an advertisement for the movie *Moscow on the Hudson* which allegedly infringed Steinberg's well known poster which appeared on the March 29, 1976 issue of *The New Yorker* magazine. *Id.* at 709. Steinberg's illustration offered:

> a bird's eye view across a portion of the western edge of Manhattan, past the Hudson River and a telescoped version of the rest of the United States and the Pacific Ocean, to a red strip of horizon, beneath which are three flat land masses labeled China, Japan and Russia.

Id. at 710. The defendant's poster presented:

> the three main characters of the film on the lower third of their poster, superimposed on a bird's eye view of New York City, and continue[d] east across Manhattan and the Atlantic Ocean, past a rudimentary evocation of Europe, to a clump of recognizably Russian-styled buildings on the horizon, labeled "Moscow."

Id. Despite the fact that the posters were different in many ways, the court found for the plaintiff. In so deciding, the court noted that the defendants could not be held liable for using "the *idea* of a map of the world from an egocentrically myopic perspective." *Id.* at 712. Nevertheless, the court ruled that general similarities in the style, vantage point, and lettering of the two posters were sufficient to constitute a copying of expression. *Id.* at 712-14.

favor of narrow copyright simply argue that the limited incentives provided by cases like *Eden Toys* are sufficient to induce production of creative works. Those taking the opposite view contend that much more protection is needed in order to encourage the plaintiff's creative labor.[206] However, if we look instead to natural law doctrines of possession, stronger limits appear.

The necessary insight follows from a reexamination of *Wheaton v. Peters*.[207] As noted previously, the *Wheaton* Court held that copyright in a work after its first publication existed only as a matter of statutory law, and not as a matter of common law.[208] Although this decision is properly seen primarily as the rejection of common law copyright, the Court's views on natural law provide valuable insight as to how we should interpret copyright statutes. The Court wrote:

> That an author, at common law, has a property in his manuscript . . . cannot be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world. . . . That every man is entitled to the fruits of his own labor, must be admitted; but he can enjoy them only, except by statutory provision, under the rules of property which regulate society, and which define the rights of things in general.[209]

Two observations are necessary to decipher this passage. First, the Court accepts the general proposition that a person is entitled to enjoy the fruits of her labor. Second, the Court refuses to recognize common law copyright because publication somehow divests the owner of rights "under the rules of property which regulate society." When one combines these observations with the knowledge that "the rules of property which regulate society"—*i.e.*, the natural law—are defined by occupation and possession, it seems that the Court was stating that publication of a work makes further possession of a work impossible.[210]

In other words, an author has a natural right in her manuscript because it is the product of her labor. That right finds vindication as property because the author physically possesses the manuscript immediately after writing it. At this point, the author owns not only the manuscript, but also the intangible ideas embodied in the work because physical possession of the manuscript enables the author to prevent others from seeing the intangibles represented in the manuscript.[211] However, once the manuscript is published and the copies are circulated to the public, the author has relinquished possession. As a matter of common law, the act of publication releases the author's work to the public just as

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206. *See* Litman, *supra* note 24.

207. 33 U.S. (8 Pet.) 591 (1834).

208. *See supra* note 89 and accompanying text.

209. *Id.* at 657.

210. *Cf.* note 43 and accompanying text.

211. *See* Millar v. Taylor, 98 Eng. Rep. 201, 231 (1769) (Yates, J., dissenting) ("An author is fully possessed of his ideas, when they arise in his mind: and therefor from the time these ideas occur to him; or from the time he writes them down, they are his property."). *See also* G. CURTIS, *supra* note 2, at 13:

> The right of literary property commences, therefore, from a full and exclusive intellectual possession of his ideas, by the author, coupled with the physical possession of the combination of characters representing those ideas, which he has traced upon paper or other material.

exhaling returns the air in one's lungs to the public.[212] Therefore, any post publication property rights given to the author must be granted by statute.[213] Later decisions enforce this interpretation of *Wheaton*.[214]

The implications of this reasoning are powerful. It suggests that statutory copyright was necessary because the property embodied in copyright was considered so abstract that it was inherently unpossessable as a matter of natural law.[215] Thus, the common law could not recognize authors' copyrights in their works, and positive enactments became the only alternative.

Once statutory copyright is seen in this light, we gain new perspective on the reach of copyright.[216] The logic of natural law concepts like *res communes* and *ferae naturae* was that recognition of certain forms of property ran the risk of being an exercise in futility.[217] It made no sense to make air one person's permanent property because air could not be possessed. Similarly, when early American courts held that copyrights were inherently beyond the common law, they were essentially saying that the intangible nature of copyright made its possession inherently difficult.[218] More importantly, their reasoning implied that any copyright statute ran the same risk of futility as a statute granting property

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212. *See* Millar v. Taylor, 98 Eng. Rep. 201, 233-34 (1769) (Yates, J., dissenting).

213. The doctrine that publication divested an author of common law copyright survived from the time of *Wheaton* until 1978. Prior to 1978, state common law protected an author's work from the time of creation until publication. Federal copyright protection attached to a work at the time of publication, but only if the author complied with the technical requirements of the federal statute. If the author published her work, but failed to comply with these requirements, both state and federal rights were lost. M. NIMMER & D. NIMMER, *supra* note 88, § 4.01. The danger that a careless dissemination of a work could divest its author of copyright led to a number of controversial decisions which appeared to stretch the limits of public dissemination without divestiture of rights. *See, e.g.*, Ferris v. Frohman, 223 U.S. 424 (1912) (public performance of dramatic work not general publication); King v. Mister Maestro, Inc., 224 F. Supp. 101 (S.D.N.Y. 1963) (oral delivery of speech to 200,000 people and press coverage which quoted entire speech not a general publication). In 1978, the law surrounding publication and its divestiture of rights changed when the 1976 Copyright Act took effect. Under the 1976 Act, federal copyright attached to a work from the moment the author fixed the work in tangible form. 17 U.S.C. § 102(a) (1978).

214. In Stowe v. Thomas, 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (No. 13,514) the court wrote:

> An author may be said to be the creator or inventor, both of the ideas contained in his book, and the combination of words to represent them. Before publication he has the exclusive possession of his invention. His dominion is perfect. But when he has published his book, and given his thoughts, sentiments, knowledge or discoveries to the world, he can no longer have exclusive possession of them.

Id. at 206. *See also* Greene v. Bishop, 10 F. Cas. 1128, 1133 (C.C.D. Mass. 1858) (No. 5,763) (adopting the views of the *Stowe* court).

215. *See* Perlman & Rhinelander, *supra* note 162, at 371 ("At common law the difficulty with perceiving a property interest in intellectual creations resulted from the common law's adherence to possession.").

216. Indeed, this perspective suggests an explanation for the general shape of modern copyright doctrine. Originality developed because the courts instinctively used a conceptual analog of *occupatio* as the basis for property in creative works. Similarly, the idea/expression dichotomy arose as a "response" to originality. Just as the Romans viewed *res communes* as an inherent limit on the reach of *occupatio*, the idea/expression dichotomy developed as an inherent limit on the reach of copyright. This result reflects natural law's pervasive influence on our social notions of property.

217. *See supra* note 35 and accompanying text. *See also* Hughes, *supra* note 23, at 319 (referring to the common ideas that cannot be granted property status).

218. For a modern expression of this view, see REGISTER OF COPYRIGHTS, 87th Cong., 1st Sess., REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 3 (House Comm. Print 1961):

> Copyright is generally regarded as a form of property, but it is property of a unique kind. It is intangible and incorporeal. The thing to which the property right attaches—the author's intellectual work—is incapable of possession except as it is embodied in a tangible article such as a manuscript, book, record or film.

in air. Thus, the natural law doctrines of possession suggest that copyright statutes should be interpreted so that their fictional possession avoids the risk of futility. In particular, the idea/expression dichotomy should prevent the extension of copyright beyond the most concrete and obvious facets of a work.[219] As the *Stowe* court wrote:

> [The author's] exclusive property in the creation of his mind cannot be vested in the author as abstractions, but only in the concrete form which he has given them, and the language in which he has clothed them. When he has sold his book, the only property which he reserves to himself, or which the law gives to him, is the exclusive right to multiply the copies of that particular combination of characters which exhibits to the eyes of another the ideas intended to be conveyed. This is what the law terms copy, or copyright.[220]

Under this view, literal infringement of a work would be within the idea/expression dichotomy's natural law boundaries, while claims to a work's perspective, style, or "total concept and feel" would not be.[221]

Of course, one might object to this use of natural law on the ground that modern intangible property rights extend beyond physically possessable objects. However, the point is not that possession provides a bright line between private property and the public domain. Instead, the lesson is that we should recognize the existence of inherent physical or metaphysical limits on the things a person can claim as property. These limits both explain and justify limiting the expansion of copyright law.

Professor Jessica Litman has recently provided a powerful example of this sort of natural law reasoning. In her article *The Public Domain*,[222] she analyzes the reasons that courts have chosen to withhold copyright protection to ideas, facts, trite plots, and systems. She concludes that the major characteristic shared by all of these intellectual products is their tendency to "seep" into our society.[223] These products, once published, quickly find their way into the minds of others. Once there, they are used so often in new works that courts find it impossible to enforce the claims of their creators.[224] Courts therefore routinely

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219. This reasoning justifies Professor Menell's conclusion that copyright in computer programs should not extend far beyond literal copying. *See supra* note 166. Even if the economic case for limiting copyright is not clear, the natural law argument is. Abstractions of any work, no matter how useful or original, are too vague and ephemeral to be capable of possession through copyright.

220. Stowe v. Thomas, 23 F. Cas. 201, 206-07 (C.C.E.D. Pa. 1853) (No. 13, 514).

221. I should make it clear that I am not advocating a result as narrow as that in *Stowe*. However, I do believe that the natural law suggests limits which are more restrictive than the limits which many courts now perceive. Courts commonly protect a work's perspective, style or "total concept and feel" under the copyright law. *See, e.g.*, Steinberg v. Columbia Pictures Indus., Inc., 663 F. Supp. 706 (S.D.N.Y. 1987) (protecting style, vantage point and lettering of plaintiff's poster); Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977) (protecting the "total concept and feel" of plaintiff's television program); Roth Greeting Cards v. United Card Co., 429 F.2d 1106 (9th Cir. 1970) (protecting the "total concept and feel" of plaintiff's greeting cards).

222. Litman, *supra* note 24.

223. *Id.*

224. Our refusal to permit private appropriation of marks which become generic provides another example of this reasoning in intellectual property. Even though a term such as "aspirin" might be recognized as private property, its generic use by the public as the designation for acetyl salicylic acid represents seepage from the private domain to the public domain. *See* Bayer Co. v. United Drug Co., 272 F. 505 (D.C.N.Y. 1921). *See also* Miller Brewing Co. v. G. Heileman Brewing Co., 561 F.2d 75 (7th Cir. 1977) (holding the term "light beer" to be

deny property claims to these things because any attempt to do so through the copyright law would be futile:

> Some aspects of works of authorship are easily absorbed, and once we have absorbed them, we are likely to make them our own and lose sight of their origins. Ideas, information, short phrases, simple plots, themes, stock scenes, and utilitarian solutions to concrete problems all share this characteristic. It makes them difficult to trace. That difficulty should make us leery of granting exclusive property rights in such things without requiring the claimant to offer significant proof in support of her claim of ownership. . . . To keep [copyright] from defeating its ends, we leave the elements subject to such absorption free from private claims, even in cases in which we could determine their initial source.[225]

The foregoing analysis shows that recognition of copyright's relationship to natural law results in the creation of a public domain. Once we abandon the notion that the idea/expression dichotomy is a purely economic instrument and add to our thinking the natural law notion that property extends only to things which are sufficiently concrete to be possessed, we find reasons to withhold copyright protection for many products of authorship even though plausible economic reasons for protecting them may exist. Copyright must be withheld because limitations inherent in the human institution of copyright make futile an attempt to grant private property in these interests. Thus, contrary to the fears of many copyright analysts, natural law does not lead to the inevitable expansion of authors' rights. If anything, the natural law of possession suggests a stronger public domain than the one courts might discover through our present economic model.

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generic); King-Seeley Thermos Co. v. Aladdin Indus., Inc., 321 F.2d 577 (2d Cir. 1963) (holding the term "Thermos" to be generic).

225. Litman, *supra* note 24. *See also id.*:

> Ideas, systems, themes, plots and scenes are not easily traced. It is difficult to ascertain the source of an idea and impossible to prove its provenance in any meaningful sense. A court is unable to unzip an author's head in order to trace the genealogy of her motifs; indeed, the author herself will often be unable to pin down the root of her inspiration. . . . It is our inability to trace or verify the lineage of ideas that makes it essential that they be preserved in the public domain.

See also Hughes, *supra* note 23, at 320-21.

Professor Litman's observation about the problems inherent in possessing ideas through copyright also provide an explanation for why other intellectual property laws grant rights in what would otherwise appear to be ideas. For example, patent laws allow claimants to prevent the borrowing of abstract processes embodied in inventions. 35 U.S.C. § 101 (1981). Under copyright, these sorts of claims would presumably be disallowed under the idea/expression dichotomy. 17 U.S.C. § 102(b) (1988) (denying copyright protection to processes, systems, and methods of operation). If metaphysical notions of possession defeated these property claims in copyright, one might think that the same result would hold in patent. This is not true, because our patent system is better designed to identify the owners of intellectual property.

In copyright, rights attach immediately upon creation and fixation. 17 U.S.C. § 102(a) (1988). Since no systematic review of a copyright's validity occurs before the presumptive creation of property rights, the possibility that a given author is claiming the same rights as another is very real. As Professor Litman points out, the ensuing difficulties of identifying the true owner are solved by denying the property claims of all. By contrast, patent grants property rights only after official review determines that no conflicting property claims exist. 35 U.S.C. §§ 131-32 (1981). The claims are narrowed down and recorded so that the extent of the property is well defined and its owner can be identified. *Id.* § 135. These procedures alleviate some of the inherent difficulties with copyright identified by Professor Litman and make possible a somewhat broader possession of intangible property. For additional discussion of how intellectual property doctrine provides substitutes for the tangible nature of physical property, see Gordon, *supra* note 3, at 1378-84.

B. *Copyright and the Moral Consequences of Labor*

The practical limits inherent in copyright law provide only half of the natural law's justification for a strong public domain. The other half springs from realizing that authorship is not a lonely endeavor in which a single person creates an entire work from her imagination alone.

Locke's justification of property in the fruits of a person's labor is premised on an assumption that the laborer is the only person who can claim credit for those fruits. Locke reasons by analogizing to a laborer's ostensibly just claim of property in acorns she gathers.[226] But for the laborer, the acorns would never have been gathered. Since no one else can claim to have gathered the acorns, the laborer's claim is exclusive and complete.

Similarly, the argument which supports an author's broad property in her work follows from an assumption that the author labors alone to produce her work. The author alone conceives of the work, develops its ideas, and brings the work to fruition. The finished work captures the author's original mental product. Thus, the author's claim to property in her work is even more complete and total as the laborer's claim in her acorns.[227]

Brief reflection reveals the flaw in this assumption. Unlike Locke's gatherer of acorns, authors do not truly labor alone. Although it is certainly true that authors are extremely gifted and industrious, the popular vision of authors as people who create new things from nothing is simply false. No author has lived an entire life on a proverbial desert island. Instead, authors live and work as members of an artistic community and a broader society whose creations, values and experiences form an integral part of the author's creative vision. Authorship is therefore not the creation of works which spring like Athena from the head of Zeus, but the conscious and unconscious intake, digestion and transformation of input gained from the author's experience within a broader society.[228] Works of authorship therefore capture more than the author's personality alone. They capture a combination of the author's personality, the society in which she lives,[229] and the works of other authors.[230] This reliance on borrowed material has powerful implications for the strength of the author's claim of complete

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226. J. LOCKE, *supra* note 38, at § 28.

227. *Cf.* W. BLACKSTONE, *supra* note 2, at *405 (describing copyright as peculiarly the subject of labor and occupancy). To some extent, this vision is enforced by our present low standard of originality.

228. Litman, *supra* note 24.

229. A good example of this is our recognition of Mozart's music as both "Mozartean" and German in its personality. Similarly, Renoir and Monet can be identified as both individuals and French. *Cf.* PLANTINGA, ROMANTIC MUSIC 362-89 (1984) (characterizing the music of Glinka, Borodin, Mussorgsky, Rimsky-Korsakov and Tchaikovsky as both distinctly Russian and individual).

230. *See* Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436):

> In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before. . . . No man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of others. The thoughts of every man are, more or less, a combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius or reflection.

Brief consideration of one's own work should prove the essential truth of this proposition. The honest legal scholar must admit that his arguments, conceptions, methods of analysis, writing style, and terminology is heavily influenced, if not directly formed, by the writings of others. Similarly, composers use sounds they have heard before,

control over her work, for it provides the factual basis on which to construct a strong public domain.

The clearest justification for a public domain occurs when material is borrowed from society without restatement. In this situation, the Lockean implication is clear. Since the author's property rights depend on her status as the creative source for the material, the author's right to control a work must be limited so as not to result in property rights over material she did not create. To the extent that this material already belongs to the public, it should remain in the public domain.

In the case of material which is borrowed and restated, the case for limiting the author's rights is less clear, but equally sound. As noted previously, complete authors' rights seem appealing if we adhere to the notion that an author conceives, develops and creates a work out of nothing with no assistance from others. Under this very unique assumption one can successfully argue that a work captures the product of the author's mind, and nothing else. Once this assumption is broken, the argument for unlimited author's rights collapses. To the extent that the author has restated the material that she has borrowed, the best that she can claim is a limited property right.

Consider a work in which an innocent person is convicted of a crime and imprisoned. Even if this work is fictional, it does not fit the popular model of something from nothing. Rather, the work captures both the the products of society (the plot) and the author (the rewriting of the plot). Under these conditions, granting the author the right to control all copying from the work is certainly unjustified because future writers who stumbled across the work and wanted to borrow the public plot would be prohibited from doing so. This problem obviously requires limiting the author's rights to something significantly less than the complete rights which are traditionally associated with natural law in copyright. This can be done only by placing parts of the author's work in the public domain.[231]

Up to now, our construction of the public domain follows the frank recognition that every work contains material which neither the author nor other individuals can claim as original work. This leaves the question of how copyright should treat the remaining material in an author's work. A superficial natural law analysis would probably conclude that copyright protects all of this material. To the extent that the work's author originated the material, copyright protects it on the author's behalf. To the extent that the material is bor-

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writers recycle plots, and computer programmers use logic and techniques that they have seen before. *See also* Litman, *supra* note 24.

231. In other words, others have the right to copy some portions of the author's work. In defining the scope of borrowing, courts must remain cognizant of the possibility that the author's original material may be inseparable from public domain material. In these cases, the doctrine of merger should be applied so that the public domain is not privately appropriated through copyright. In other words, the public domain is actually augmented by denying property rights in original material. *See* Herbert Rosenthal Jewelers v. Kalpakian, 446 F.2d 738 (9th Cir. 1971). Additional natural law support for this proposition comes from the famous Lockean proviso. In that passage, Locke denies the existence of property in the fruits of a person's labor where the appropriation fails to leave "enough and as good" for others. J. LOCKE, *supra* note 38, at § 27.

rowed from others, the author has presumably committed copyright infringement against those persons.

Upon first consideration, this scheme appears fair and just. After all, those authors who create original material should receive property rights in their creations. Those who borrow those creations should pay compensation. Thus, copyright should ruthlessly protect an author's right to prevent any borrowing of his creative products. Copyright's public domain should therefore contain only material which no person can claim as original. However, closer consideration of this position reveals its flaws, for a public domain which includes original creations is in fact preferable to a public domain which does not.

Under complete authors' rights, an author would receive compensation from any successor who borrowed from the author's work.[232] However, our author would also owe huge debts to her predecessors for any material she might have borrowed from them. The magnitude of this debt is apparent when one considers how difficult an author's task would be if people really did have complete property rights in their intellectual products. For starters, a hypothetical writer would have no right to use many literary techniques or language itself. If our author were a composer, other individuals would already claim exclusive rights to basic musical forms and styles such as the sonata form, impressionism, and the like. A painter would surely confront similar problems when drawing inspiration from the works of others. Indeed, if property rights in all products of the mind really were complete, practically all of mankind's intellectual heritage would be private property. Future authors would simply have little, if any, chance of achieving any sort of viable art. If nothing else, the cost of compensating all sources for material borrowed would bankrupt any author. The problems of "reinventing the wheel" would be simply overwhelming.[233]

When seen in this light, the argument for complete authors' rights falters again. If existing authors gain the power to prohibit all borrowing from their works, the problem of how these authors should compensate their predecessors immediately occurs. However, no system of payment will work. First, the problem of how much compensation should be paid guarantees a legal nightmare. Second, and more importantly, identification of the proper parties to compensate is impossible. Even if an author could identify the sources from whom she had borrowed,[234] the problem immediately replicates itself as those sources attempt to identify the persons from whom they borrowed.[235]

The solution to this problem is to limit the property claims of authors in their works by creating a vigorous public domain which contains original mate-

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232. Under a complete authors' rights view, any borrowing from a work would violate the author's natural rights. The logical consequence is that future individuals would owe compensation to authors from whose works they chose to borrow.

233. *Cf.* Chaffee, *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 511 (1945) ("A dwarf standing on the shoulders of a giant can see farther than the giant himself."). The work of modern psychologists also suggests the importance of copying in artistic achievement. *Cf.* H. GARDNER, ARTFUL SCRIBBLES 164-91 (1980).

234. This possibility is highly unlikely. The notion that sources for unconscious borrowing could be identified is particularly absurd. *See* Litman, *supra* note 24.

235. Ignoring the problem is not a justifiable option. If existing authors profit by extracting royalties from future authors while paying no royalties to their predecessors, a form of unjustified enrichment results.

rial. This course of action solves, in a general way, the problem of whom and how much to pay. Since the identification of one prior author as a person to be compensated merely raises the problem of identifying more persons, it quickly becomes clear that practically every author would both owe and be owed compensation under a complete property rights scheme. This implies that society could more fairly "balance the books" among all authors by simply recognizing the fact that authors will always owe a great deal to each other and letting it go at that. In other words, society should forgive many of the "debts" owed by modern authors to their predecessors. In return for this windfall, modern authors should forgive similar debts to future authors. The effect of such a scheme would be to place even original material into a public domain from which future authors could borrow and to which they must contribute.[236]

The foregoing analysis demonstrates that the complete vindication of authors' property claims is not the necessary consequence of restoring natural law to our copyright thinking. Indeed, once we recognize the true nature of authorship, the moral force behind originality as the justification for complete authors' rights disappears. Instead, serious limits on copyright's reach appear.[237] Of course, these limits do not imply that an author's property claims should be ignored. Authors certainly create material in which they deserve property rights. The point is that the property rights authors deserve under natural law are neither unlimited nor perpetual. Many copyright claims must be denied because they imply the privatization of public domain material. More importantly, even if property rights are recognized, it is entirely appropriate to restrict those rights to a limited number of years, thereby eventually dedicating the entire work to the public domain.[238]

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236. For a discussion of the concept of reciprocity, see Michelman, *Property, Utility and Fairness*, 80 HARV. L. REV. 1165, 1222-24 (1967); Gordon, *supra* note 3, at 1463-64. The equitable contribution of authors to the public domain could be achieved in two ways. First, portions of every work should be dedicated to the public domain immediately upon creation. These portions should include those which are both likely to have been borrowed and are likely to be borrowed in the future. A good example in modern copyright is the doctrine of *scenes a faire*, which places trite plots, scenes and sequences into the public domain. *See, e.g.*, Schwarz v. Universal Pictures Co., 85 F. Supp. 270 (S.D. Cal. 1945); Cain v. Universal Pictures Co., 47 F. Supp. 1013 (S.D. Cal. 1942). Although these trite devices may sometimes be original, the likelihood of their having been borrowed and their use by future authors makes their immediate inclusion in the public domain fair. Second, all works should receive copyright protection for a limited time only, thereby ensuring eventual dedication to the public domain while providing a fair vindication of the author's creative labor. Such a result exists under 17 U.S.C. § 302(a) (1978), which terminates copyright fifty years after the author's death.

237. Indeed, in Professor Litman's view, a serious jurisprudence of originality would destroy the copyrightability of most works. *See* Litman, *supra* note 24.

238. The possibility of limiting copyright by applying concepts such as originality and by restricting copyright's duration creates an interesting natural law balance. Since the extent of any property right is positively related to both the number of the substantive rights and their duration, it follows that broad substantive rights which last for a short while are comparable to narrow substantive rights which last for a long time. Thus, the breadth of the rights granted to authors should be inversely proportional to the length of copyright's term. A modern court interpreting our copyright statute must therefore be mindful of the fact that copyright presently lasts for the life of the author plus fifty years. In my view, the long length of copyright implies that the substantive rights authors can claim should be quite limited. By contrast, the comparatively short seventeen-year term of patent may justify the somewhat broader rights granted under the patent law. *Compare* 17 U.S.C. § 302 (1988) *with* 35 U.S.C. § 154 (1981).

IV. CONCLUSION

This Article has advocated the restoration of natural law to our copyright jurisprudence by making three separate, but related, arguments. First, the Article pointed out the descriptive shortcomings of our economic copyright model. Despite rhetoric to the contrary, copyright's history and doctrine bear the unmistakable marks of natural law. Second, the Article showed that economics alone cannot serve as copyright's sole normative touchstone. Theories beyond economics are required to address the practical and theoretical problems which beset the normative use of economics. Third, we should use natural law because it is already imbedded in our copyright concepts and because it is capable of justifying an initial assignment of rights through copyright law.

Of course, the suggested restoration of natural law does not mean that economic analysis of copyright should be abandoned. Copyright has undeniable economic consequences. It is entirely appropriate that we should use the insights of economics to understand how copyright affects the lives of authors and consumers. However, we must also remind ourselves that the economic effects of copyright must, in the end, be justified by principles beyond the realm of economics. We must identify the natural law insights which guide how the economic institution of copyright should be shaped.[239] This course of action will undoubtedly open new avenues of inquiry into copyright law.

First, society must decide just what kind of rights an author's labor will support. Since copyright properly depends on the author's ability to claim a work as her original product, we must learn how to identify material which is truly created by the author. This will require theories of how the creative mind works. Psychological studies may offer great insight here. Similarly, identifying material which is the product of the author's culture requires some vision of how a society creates and adopts certain creative expressions as its own. Literary, artistic and sociological theories will undoubtedly prove useful here. Additionally, philosophical issues such as fairness and the distribution of property within our society must be discussed so we can evaluate the question of just how much intellectual property a single author deserves.

Second, society must explore and resolve the conflicts between rights based upon an author's labor and the other rights of individuals. For example, copyright scholars have already identified conflicts between the first amendment and copyright. To the extent that copyright hinders the ability of future authors to express themselves, their free speech has been diminished.[240] A similar conflict exists between an author's right to property and other individuals' right to par-

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239. *See* Brown, *supra* note 23, at 607 (arguing that a combination of authors' rights and economic analysis is the optimal way to analyze copyright); Dreyfuss, *supra* note 23 (analyzing the work made for hire doctrine by merging author-based and economic approaches).

240. *See* Yen, *supra* note 17. *See also* Denicola, *Copyright and Free Speech: Constitutional Limitations of the Protection of Expression*, 67 CALIF. L. REV. 283 (1979); Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Nimmer, *Does Copyright Abridge First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970); Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 COPYRIGHT LAW SYMP. 43 (1971).

ticipate and share in the intellectual life of society.[241] Finally, a conflict exists between copyright and privacy.[242]

Of course, there is no guarantee that any of these inquiries will ultimately prove successful. The uncertainty, difficulty and discomfort of breaking away from the familiar economic copyright model will create great pressure to retain the jurisprudential status quo. However, holding fast to the status quo is not a truly viable option. As this Article has shown, the solely economic interpretation of copyright creates ambiguity which courts cannot resolve by further economic study. Thus, the status quo forces courts to justify their decisions as a matter of economics when economics cannot provide the desired support. Confidence in the judiciary may erode as doctrine is exposed as unjustified. Even worse, when courts necessarily proceed by resolving economic ambiguities on the basis of noneconomic (*i.e.* natural law) principles, our refusal to explicitly develop a natural law copyright jurisprudence means that courts lack well reasoned precedent on which to base their decisions. The absence of adequate guidance renders the climate ripe for arbitrary and unwise judicial decision making.

In short, we should learn a valuable lesson from the early Americans who realized that copyright has solid roots in both economics and natural law. To be sure, we have gained many useful insights through our modern loyalty to economics. However, we must also recognize the fact that the creation and assignment of property rights raise questions of value and morality that cannot be answered or avoided by appealing to efficiency. Whether we like it or not, copyright greatly affects the intellectual world in which we live. How we choose to shape that world can be resolved only by considering basic notions of what is fair and just.[243] Because of this, the proper future construction of our copyright law depends on the restoration of its natural law heritage.

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241. This conflict is posed in article 27 of the Declaration of Human Rights. That article provides:

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Declaration of Human Rights, art. 27 (quoted in S.M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS 5 (1983)).

242. The case of Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984), illustrates this point. In that case, the Supreme Court held that home videotaping of copyrighted television programs for purposes of time shifting was a fair use. Although the case was not decided on privacy grounds, its facts lend themselves to a privacy analysis because time shifting occurs within the putative infringer's home. *Cf.* Stanley v. Georgia, 394 U.S. 557 (1969) (affording constitutional protection for the private in-home possession of obscenity); Carter, *Copyright Protection, the Right to Privacy, and Signals that Enter the Home*, 8 CARDOZO ARTS & ENT. L.J. 289 (1984).

243. *See* P.A. SAMUELSON, ECONOMICS 8 (6th ed. 1955) ("Basic questions concerning right and wrong goals to be pursued cannot be settled by [economics] as such. They belong in the realm of ethics and 'value judgments.' "); Heyne, *The Foundations of Law and Economics: Can the Blind Lead the Blind?*, in RES. IN. LAW & ECON., vol. II, at 53, 65 (1988) ("Efficiency and fairness are complements, not substitutes. Each helps to repair the ultimate indeterminacy of the other. We do not have to repudiate fairness to obtain help from efficiency; nor must we forgo the assistance that efficiency considerations provide in our groping for fairness.").